Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Meyer, Katherine
kmeyer@law.harvard.edu
617-998-2450
Westfahl, Scott
swestfahl@law.harvard.edu
617-495-5559
Minow, Martha
minow@law.harvard.edu
617-495-4276
Olson, Andrea
aolson@law.harvard.edu
(209)-648-2578

References

• Professor Martha Minow, Harvard Law School, minow@law.harvard.edu, (617)-495-4276
• Professor Scott Westfahl, Harvard Law School, swestfahl@law.harvard.edu, (617)-495-5559
• Katherine Meyer, Harvard Law School, kmeyer@law.harvard.edu, (202)-257-5145
• Andrea Olson, Harvard Law School, aolson@law.harvard.edu, (209)-648-2578

This applicant has certified that all data entered in this profile and any application documents are true and correct.

BARBARA TSAO

87 New Street Unit 106, Cambridge MA 02138 · btsao@jd23.law.harvard.edu · 979-492-7277

June 17, 2023

The Honorable P. Casey Pitts
U.S. District Court, Northern District of California
San José Courthouse
San Jose, CA

Dear Judge Pitts:

I am a recent graduate from Harvard Law School and I am writing to express my interest in a clerkship in your chambers for 2023 or 2024. I grew up in the Bay Area and will moving back come July.

Enclosed please find my resume, law school transcript, and writing sample. The following people are submitting letters of recommendation separately and welcome inquiries in the meantime:

- Professor Martha Minow, Harvard Law School, minow@law.harvard.edu, (617)-495-4276
- Professor Scott Westfahl, Harvard Law School, swestfahl@law.harvard.edu, (617)-495-5559
- Katherine Meyer, Harvard Law School, kmeyer@law.harvard.edu, (202)-257-5145
- Andrea Olson, Harvard Law School, aolson@law.harvard.edu, (209)-648-2578

As you will see from my resume, during law school I have gained extensive experience with legal research, analysis, and writing. As a member of the Board of Student Advisers, I serve as a Teaching Fellow for the First Year Legal Research and Writing Program and mentor 1L students in their writing. I also work as a Research Assistant for Professor Martha Minow, tracking case law on evolving areas of federal and state constitutional law. As a summer associate at both Covington & Burling and Vinson & Elkins, I wrote several memoranda concerning white collar investigations, life science litigation, consumer protection guidelines, antitrust best practices, attorney-client privilege, privacy law, and class certifications.

I would be honored to interview with you and contribute my skills to the important work of your chambers. Thank you for your time and consideration.

Sincerely yours,

Barbara Tsao

Barbara Tsao

Enclosures

BARBARA TSAO

87 New Street Unit 106, Cambridge MA 02138 · btsao@jd23.law.harvard.edu · 979-492-7277

EDUCATION

Harvard Law School, Cambridge, MA
J.D. Candidate, May 2023
Activities: *Harvard Environmental Law Review*, Subciter
Board of Student Advisers, Vice President of Advising
First Year Legal Research and Writing, Teaching Fellow
Professor Scott Westfahl, Teaching Fellow
Asian Pacific American Law Students Association, Co-President
Awards: The 2023 David Westfall Memorial Award for Community Leadership

Texas A&M University, College Station, TX
B.S. in Biomedical Science (Honors Fellow), May 2017
Honors: University Scholars Scholarship
Undergraduate Research Scholar
Publications: Tsao, Barbara (2017). Effects of the Estrous Cycle on Neuronal Activation in the Bed Nucleus of the Stria Terminalis of Fear-Conditioned Female Rats. Undergraduate Research Scholars Program. Available electronically from http://hdl.handle.net/1969.1/164386.
Tsao, Barbara (2016, October). Predictive Analytics and the Future of Health and Human Services. *Policy and Practice*, *74*(5), 6+.
Study Away: Public Policy Internship Program in Washington, D.C.

EXPERIENCE

Covington & Burling LLP, Palo Alto, CA
Incoming Litigation Associate, September 2023

Professor Martha Minow, Harvard Law School, Cambridge, MA
Research Assistant, September 2022-present

- Research case law to find examples of evolving areas of constitutional law for 1L classroom instruction.
- Track state litigation regarding the adequacy of education under state constitutions.

Covington & Burling LLP, Washington, DC and Palo Alto, CA
2L Summer Associate, Summer 2022

- Researched and wrote memoranda regarding white collar investigations, life science litigation, consumer protection guidelines, antitrust best practices, and privacy law.
- Advised co-counsel pro bono on best attorney-client privilege practices on behalf of Haitian asylum seekers.

Animal Law & Policy Clinic, Harvard Law School, Cambridge, MA
Student Attorney, Spring 2022

- Researched and wrote memorandum on the disclosure of wildlife trafficking data under FOIA.
- Drafted relisting petition to the U.S. Fish and Wildlife Service to reclassify West Indian Manatees as endangered under the Endangered Species Act.

Vinson & Elkins LLP, Houston, TX
1L Summer Associate, Summer 2021

- Performed due diligence for private equity clients and conducted executive compensation research.
- Researched and wrote memoranda on class certification pro bono for the International Refugee Assistance Project.

College Station High School, College Station, TX
Physics Teacher, September 2019-May 2020

- Expanded an 11th grade laboratory-oriented course emphasizing data analysis and communication skills.

LANGUAGES Proficient in Mandarin.

INTERESTS Alpaca farming, portrait photography, videography, board games, podcast enthusiast.

Harvard Law School

Date of Issue: May 30, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Barbara Tsao
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023
David Westfall Memorial Award for Student Citizenship
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 7 Greiner, D. James	P	4
1001	Contracts 7 Lessig, Lawrence	H	4
1006	First Year Legal Research and Writing 7B Elinson, Gregory	P	2
1003	Legislation and Regulation 7 Rakoff, Todd	P	4
1004	Property 7 Smith, Henry	P	4

Fall 2020 Total Credits: 18

Winter 2021 Term: January 01 - January 22

1058	Leadership Fundamentals Westfahl, Scott	CR	2

Winter 2021 Total Credits: 2

Spring 2021 Term: January 25 - May 14

1024	Constitutional Law 7 Minow, Martha	H	4
1002	Criminal Law 7 Gersen, Jeannie Suk	P	4
1006	First Year Legal Research and Writing 7B Elinson, Gregory	P	2
2359	Food Law and Policy Broad Leib, Emily	H	2
1005	Torts 7 Lahav, Alexandra	P	4

Spring 2021 Total Credits: 16
Total 2020-2021 Credits: 36

Fall 2021 Term: September 01 - December 03

2043	Copyright and Trademark Litigation Cendali, Dale	P	2
2048	Corporations Fried, Jesse	P	4
2463	International Intellectual Property, Public Health, and Access to Medicines Okediji, Ruth	H	3
2829	Wildlife Law Glitzenstein, Eric	H	2

Fall 2021 Total Credits: 11

Winter 2022 Term: January 04 - January 21

2016	The Role of the Article III Judge Griffith, Thomas	P	2

Winter 2022 Total Credits: 2

Spring 2022 Term: February 01 - May 13

8052	Animal Law & Policy Clinic Meyer, Katherine	H	3
3004	Animal Law & Policy Clinical Seminar Meyer, Katherine	H	2
2234	Taxation Warren, Alvin	P	4
2250	Trusts and Estates Sitkoff, Robert	P	4

Spring 2022 Total Credits: 13
Total 2021-2022 Credits: 26

Fall 2022 Term: September 01 - December 31

2897	Contemporary Issues in Constitutional Law Liu, Goodwin	H	2
2074	Environmental Law Lazarus, Richard	P	4
2079	Evidence Lvovsky, Anna	P	4
2934	Patent Trial Advocacy Tompros, Louis	H	3

Fall 2022 Total Credits: 13

Winter 2023 Term: January 01 - January 31

7000W	Independent Writing Meyer, Katherine	H	2

Winter 2023 Total Credits: 2

Spring 2023 Term: February 01 - May 31

3115	Advanced Negotiation: Money, Negotiation & You Heen, Sheila	H	3
2086	Federal Courts and the Federal System Fallon, Richard	P	5

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: Barbara Tsao

Date of Issue: May 30, 2023
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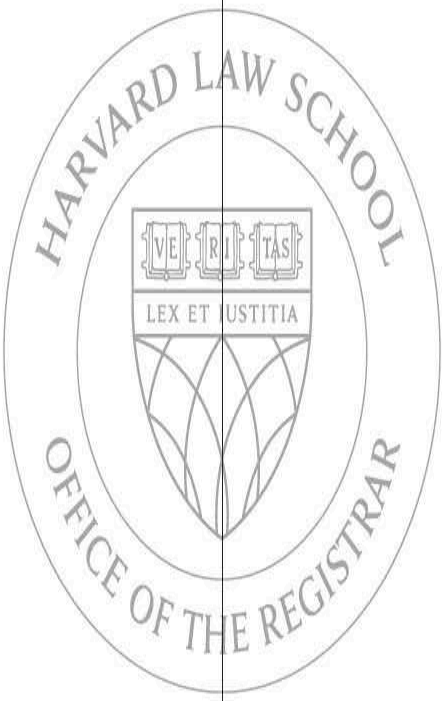
2169	Legal Profession Gordon-Reed, Annette	H	3
		Spring 2023 Total Credits:	11
		Total 2022-2023 Credits:	26
		Total JD Program Credits:	88

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 17, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing to highly recommend Barbara Tsao who has applied to be a law clerk for you upon graduation from law school. Ms. Tsao will make an excellent law clerk.

Ms. Tsao participated as a Clinician in our Animal Law & Policy Clinic Spring Semester of 2022. The Clinic is relatively new – it was launched in the Fall of 2019, and I am its first Director. Prior to coming to Harvard, I was in private practice for many years and, with my partner, operated a small public interest firm in Washington, D.C.. In that capacity, I had many law clerks and associates, and therefore have a strong sense of what is needed in an exceptional law clerk. Ms. Tsao has all those qualities.

Babs is extremely smart and analytical. She is articulate and writes exceptionally well. She has shown that she can take very difficult assignments and excel at legal research and writing to produce a final product that is stellar. I have no doubt that she will make an excellent law clerk for any chambers.

Our Clinic has two components – a weekly two-hour Seminar and a Clinical component for which the students work on real-life projects for clients for approximately 16 hours a week. Ms. Tsao performed extremely well in both aspects – she was always well prepared for class and did outstanding work for the Clinical component.

For her Clinic projects, Ms. Tsao worked on two very difficult projects. With several other students, she prepared a petition to change the listing status of the Florida Manatee from “threatened” to “endangered” under the Endangered Species Act. This required her to master not only difficult legal issues, but also complex scientific issues, including the adverse impacts on the manatee caused by Climate Change. She handled the assignment with total aplomb and produced an outstanding final product that was submitted to the Fish and Wildlife Service in November 2022. She also represented the Center for Biological Diversity in a case under the Freedom of Information Act concerning the release of data about wildlife trafficking. She drafted a very helpful memorandum about the state of the law under Exemption 4 in light of a recent Supreme Court case, and did an outstanding job. Her work is thorough, well written, and easily transformed into a document that can be submitted to a federal agency or court. The clients were extremely pleased with her work, as was I.
At the end of each Semester I ask the students to write a 10-page paper, pitching a new project for the Clinic. Although I have received many such papers over the last four years of my tenure at Harvard, I have only adopted two as actual projects for the Clinic, and Ms. Tsao’s was one of them. She wrote a very interesting paper advocating that we do something to end a particularly horrific “rattlesnake roundup” that occurs in Texas each year, that not only involves torturing and killing the snakes, but also requires gassing their dens with chemicals that have adverse impacts on certain invertebrate species listed as endangered under the Endangered Species Act. Based on her research, legal analysis, and advocacy, the Clinic is now actively engaged in pursuing this matter. I mention this because it shows that she is passionate about her work and also knows how to think outside the box to achieve overall objectives.

Babs is also currently working on an independent writing project concerning Article III standing to challenge the conditions of animals held in captivity, and I am acting as her supervisor for that project. She has already prepared a detailed outline demonstrating that she understands the current relevant standing law and showcases her ability to think about new avenues for expanding standing theories.

Babs is a very hard worker and will spend whatever time is necessary to get to the bottom of an issue. She also has a winning personality – she is warm, compassionate, and a good listener. All of the other students in the Clinic very much enjoyed working with her – she is an excellent team player. In short, she is precisely the kind of person who will make an excellent addition to your chambers. I highly recommend her!

Please let me know if there is any additional information I can provide you about Babs – I would be happy to do so. If you would like to reach me by phone, my cell no. is 202-257-5145.

Sincerely,

Katherine A. Meyer
Director, Animal Law & Policy Clinic

Katherine Meyer - kmeyer@law.harvard.edu - 617-998-2450

HARVARD LAW SCHOOL

SCOTT A. WESTFAHL
PROFESSOR OF PRACTICE AND DIRECTOR OF EXECUTIVE EDUCATION
Areeda Hall Room 518, Cambridge, MA 02138
swestfahl@law.harvard.edu, Phone: 202-445-1395

June 22, 2023

RE: Recommendation on behalf of Barbara (Babs) Tsao

The Honorable P. Casey Pitts
United States District Court
Northern District of California
San José courthouse
San Jose, CA

Dear Judge Pitts,

I understand that Babs Tsao is applying for a clerkship in your chambers, and I highly recommend her to you. Babs is a very talented law student whose creative thinking, emotional intelligence, team-orientation, and generosity of spirit have particularly impressed me. She thinks both broadly and deeply and approaches any project she undertakes with enthusiasm and curiosity. Having her on your team would provide interesting new perspectives, rigorous and informed analysis, and a daily infusion of Babs' positive, insightful, collaborative, and reliable energy.

I have come to know Babs very well during her time at Harvard Law School. In January 2021, she was a student in my "Leadership Fundamentals Workshop" for first-year students. She was exceptional among her peers in that class and as a result, I invited her to become a Teaching Fellow for the course in both 2022 and 2023. The course is team-based and highly interactive and experiential, requiring our teaching team to provide students and their teams with frequent feedback and coaching. Students praised Babs' input on their work and the insights she shared in class. She also exercised daily, informal leadership within our teaching team of myself and four Teaching Fellows. Most importantly, Babs was highly creative in helping us to design new ways to introduce leadership principles to students in both an online (2022) and in-person (2023) format for the course. When she is part of a team facing a new problem, Babs quickly builds upon others' ideas and is willing to challenge assumptions and introduce new thinking and approaches when lines of thought get stuck. I am certain that she would bring the same approach to working in your chambers.

In my leadership courses, I teach law students about teamwork and share with them the research that shows how and why diverse teams often outperform more homogenous teams. Having Babs as a member of my teaching teams perfectly illustrated that principle. In designing our course and finding new ways to connect with our 40-65 students, Babs leveraged the wealth of knowledge and insights she has gained from her background as a first-generation law student, restaurant/service industry employee, public school science teacher and Vice President of Advising for the HLS Board of Student Advisers. Babs never hesitated to share her thoughts about perspectives that we were failing to consider. We received outstanding course evaluation scores, particularly for creating an inclusive environment.

TEL: 202-445-1395• E-MAIL: swestfahl@law.harvard.edu

Over the past two years, I have also become an informal mentor and career advisor for Babs. In that capacity, I have found Babs to be very thoughtful and deliberate about her course and employment choices and very open to new ideas and coaching. Babs cares deeply about other people and making a positive impact in the world through service. I know that she has a strong interest in returning to teaching in the future and that her interest in a clerkship arises in part from that ambition. I am quite certain that her experience as a clerk in your chambers would translate to important learning for her future students.

For your calibration, prior to joining the HLS faculty I practiced law at a national firm for ten years; spent six years as a professional development leader at McKinsey & Company; and then led professional development and training at a global law firm. I have hired, mentored, coached, and evaluated hundreds of professionals over the course of my career. Among those professionals, Babs ranks very highly in problem-solving instincts, emotional intelligence, ability to create a positive and inclusive team environment, creativity, kindness and presentation and communication skills.

Please let me know if I may answer any questions or provide any additional information in support of her application. I hope you will provide Babs with an opportunity to work with you and your team.

Very truly yours,

Scott A. Westfahl

TEL: 202-445-1395• E-MAIL: swestfahl@law.harvard.edu

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am delighted to give my strong recommendation for Barbara (Babs) Tsao who hopes to serve as your law clerk. She was a terrific student in my 80-person Constitutional Law course and provided vital research assistance as I prepare a new version of the course. She also has been a superb leader on campus and she has invaluable abilities to community well, to connect with a wide variety of people, and to juggle and fully complete many demanding assignments.

In my 2021 Spring Constitutional Law Class, she often volunteered and made important contributions to class discussions. In addition, she performed impressively on an assignment early in the term. I assign each student to a case/problem to be argued or debated in class, with a prior submission of a written analysis and a post-class written reflection on unanticipated issues. Her case problem, Association for Accessible Medicines v. Brian E. Frosh, addressed the question of whether the State of Maryland could regulate prices of medicines to consumers in Maryland, including wholesale transactions upstream from consumer sales, without infringing on the dormant Commerce Clause. She crisply analyzed the issues and made an effective argument, while responding nimbly to questions. She crucially helped set a high standard. Her work was especially memorable because the entire curriculum and courses were at that time conducted remotely due to the pandemic. Even though she was two thousand away from Cambridge, MA in her home in College Station, TX where she lives on a farm, she brought dynamism and clarity to the class. Her final exam was perfectly fine, I have seen her talents rise above test level in subsequent work.

She shows initiative and commitment to strengthening the opportunities for others. In the Fall of 2021, she reached out to me about working as a Teaching Fellow if we continued to have to teach remotely, and I hired her if that need would arise, but it did not. So instead I hired her this past fall to research recent and pending matters in evolving areas of constitutional law as potential case problems for the Spring 2023 Constitutional Law class. She produced a thorough and rich analysis that showed care, imagination, and rigor. I used several of the matters she identified in my current course. I also asked her to research recent litigation concerning state litigation regarding the adequacy of education under state constitutions as I prepared to give keynote lecture at a law school conference marking the 50th anniversary of San Antonio Ind. Schl. Dist. v. Rodriguez. I consider her work in both contexts excellent and I would hire her again with confidence that she would produce further great work.

Her capabilities have drawn attention of others here including faculty, staff, and students. Our Dean of Admissions recruited her to lead a learning team on teaching fellows and prospective students for Future-L (a collaboration between Harvard Law School and the National Education Equity Lab). Future- L provides high-school students from low-income and underrepresented backgrounds with an introduction to the United States legal system and the legal profession. Babs prepared for and led multiple discussion sessions with the prospective students over the four-week class. She joined and contributed to teaching meetings with fellow team leaders and law school staff. She contributed to pre- and post-course meetings and to the opening and closing ceremonies for the students. I attended the closing ceremony and heard her students spoke about the positive impact she had both on their learning and on the program.

She has also served as the Vice President of Advising for the Board of Student Advisers (BSA). The BSA is a student organization charged with providing several essential services to the Harvard Law School community: its members serve as teaching assistants in the First Year Legal Research and Writing Program, as peer advisers to members of the first-year class and transfer students, and as administrators of the Ames Moot Court competition. The BSA is a two-year commitment, and the selection process is highly competitive with a lower acceptance rate than the Harvard Law Review. As the Vice President of Advising for the BSA in the 2022-2023 academic year, she oversaw all outward facing BSA programming and messaging targeted at 1Ls. I was especially impressed by the work she did coordinating academic, professional, and wellness BSA programming for the 1L class and drafted all email communications to be sent from the BSA to the 1L class. Her work ensured accurate and thoughtful messaging, and excellent project management skills.

She also has served as Co-President of the Asian Pacific American Law Students Association (APALSA), now the largest affinity organization on campus, with a membership of over 100 1Ls alone. She has overseen 23 board members and facilitate political, academic, and social programming at Harvard Law with the goal of promoting a greater understanding of issues affecting Asian Americans. She contributed to the plans for a conference and developed events on affirmative action in the law in relation to oral arguments at the Supreme Court.

I think she will pursue a career in litigation and also teaching as a lecturer, visiting professor, or clinical professor. She has developed expertise in education law and in animal law. Her work at the Animal Law & Policy Clinic has involved interdisciplinary advocacy.

She told me that she has tried to be a part of this rare community to the fullest and the has given back at least as much as she has received from the law school. She is a true team player and pitches in the make everyone’s work better.

Babs adds to the excellence of our students in analysis and writing a zest for mastering complex facts and legal doctrines and truly outstanding talents in communicating and in completing multiple simultaneous assignments. I am confident she would be a

Martha Minow - minow@law.harvard.edu - 617-495-4276

true asset to your chamber and also a delightful presence.

Sincerely,

Martha Minow
300th Anniversary University Professor
Harvard Law School

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

Andrea Olson
Climenko Fellow and Lecturer on Law
116 Griswold Hall
aolson@law.harvard.edu
(209) 648-2578

Dear Judge Pitts:

It gives me great pleasure to recommend Barbara (Babs) Tsao for a clerkship with your chambers.

Babs has served as a Board of Student Advisors Teaching Assistant for my first-year Legal Research and Writing class at Harvard Law School for the 2022–23 term. The Board of Student Advisors is a highly selective student organization—extending invitations to only twenty-one of more than one hundred student applicants annually. The application process asks students to demonstrate editing and mentoring skills, to highlight any prior work or teaching experience, and to prepare a personal statement essay. It also considers first-year grades and the advice and feedback of faculty members and peers. The Board requires a two-year commitment and precludes membership from the Harvard Law Review and Harvard Legal Aid Bureau because of the high workload.

In her capacity as a Teaching Assistant for Legal Research and Writing, Babs supports all aspects of the research and writing pedagogy. She assists with lesson planning, meets individually with students, serves as a formal mentor for 13 first-year students, gives feedback and guidance on drafts, attends every class session, supports peer editing and in-class exercises, answers research and citation questions, and frequently presents to students in class. The role is a challenging one, which asks a budding lawyer to give guidance to her peers—and sometimes also to her manager—on a skill that she herself is still developing. Babs rises to the challenge with excellent analytic ability, collaborative pedagogical skill, and warm personality. She will make an outstanding law clerk.

The contributions that Babs has made in my class and indeed throughout her law school career demonstrate a very strong aptitude for legal analysis that will make her a terrific law clerk. In our fall semester, our students prepared two objective memos, and Babs helped to coach her cohort of students through the challenges of a new form of writing, unfamiliar legal research, complex case synthesis, and the finer points of analogical reasoning. This spring, we introduced a new, complicated statutory interpretation question. Babs quickly came up to speed on the problem and was able to guide her students through substantive and stylistic issues as they prepared sample appellate briefs. Over the course of the year, I have never hesitated to refer a student to Babs for help with questions on any of these assignments, big or small.

Beyond her impressive approach to challenging legal problems, Babs excels as a mentor. Her own background teaching shows in every aspect of her work—her patience, methodological

approach to problem solving, leadership, and genuine interest in others. Not surprisingly, with that background, Babs combines insight, organization, and energy in her interactions with her students. She is a strong communicator, and she builds trust with people around her.

Overall, Babs has been a wonderful resource and valued partner to me in preparing our Legal Research and Writing course. She takes the job seriously, and she sees the class itself as striving to achieve a shared goal. She asks useful questions, drives projects to resolution, takes and implements direction and feedback, pays close attention to detail, and works incredibly well as part of a team.

I have spoken with Babs at great length about her career goals and her interest in clerking. She comes to the decision with maturity and thoughtfulness, thinking both about how a clerkship could aid her in her career goals and how the opportunity will help her ultimately to be of greater service to others. As a clerk, Babs will enrich chambers with her collegiality, background, and experience. She is enormously kind and respectful of others. I have no doubt that she will be an enormous asset, prepared to hit the ground running on day one.

Please do not hesitate to contact me if I can provide greater detail that would be helpful for your consideration. I can be reached by email (aolson@law.harvard.edu) or phone (209-648-2578) at your convenience. Babs is a truly extraordinary person, and I hope that you will strongly consider her application.

Sincerely,

Andrea Olson

BARBARA TSAO

87 New Street Unit 106, Cambridge MA 02138 · btsao@jd23.law.harvard.edu · 979-492-7277

WRITING SAMPLE

Drafted Winter & Spring 2023

The attached writing sample is an independent paper I drafted as a part of the Winter Term Writing Program (WWP). I independently conducted all the research in this paper, and this work has been reviewed by my faculty supervisor, Katherine Meyer. For my paper, I explain how Article III standing is arguably the most significant legal obstacle animal advocates must overcome when litigating animal welfare issues in the federal court system.

MODERN ARTICLE III STANDING: AN OBSTRUCTION TO BASIC LEGAL REMEDIES IN ANIMAL ADVOCACY LITIGATION

Barbara Tsao

Article III standing is arguably the most significant legal obstacle animal advocates must overcome when litigating animal welfare and environmental conservation issues in the federal court system. Without standing, prospective plaintiffs cannot vindicate their legal rights and pursue appropriate legal remedies. This paper provides an overview of the development of modern Article III standing doctrine, with an emphasis on bringing cases against the federal government, examines how standing requirements in federal court harm animal legal advocacy efforts, and explores solutions for realizing effective legal remedies for animal interests.

INTRODUCTION

A legal right is only as substantive as the availability of its legal remedy. Normally, when a legal right is "invaded," the law provides "a legal remedy by suit or action at law." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Legal remedies have the important function of supporting the enforceability of legal rights; legal remedies *deter* the invasion of legal rights in the first instance and *correct* violations when they do occur. However, despite the crucial role legal remedies play, they are not always available when violations of legal rights occur. In fact, across several areas of the law, there exist instances in which the enforceability of broad, articulated legal rights are significantly hampered by the limited avenues through which they can be asserted. See, e.g., *Marbury*, 5 U.S. (1 Cranch) at 176 (finding that the plaintiff had a legal right to his judicial appointment, but that the court had no jurisdiction to grant a remedy); *U.S. v. Armstrong*, 517 U.S. 456, 458 (finding that the plaintiff had a legal right to equal protection, but limiting discovery necessary to actually effectuate antidiscrimination law); *Los Angeles v. Lyons*,

461 U.S. 95, 111 (finding that the plaintiff had a legal right to be protected from an illegal chokehold, but refusing to grant an injunction against police officers). By raising significant barriers to legal remedies, courts can render a legal right almost worthless.

The standing requirement is a particularly significant barrier to legal remedies in federal court. Modern courts frequently apply standing requirements using restrictive readings of the Constitution and by applying prudential standing limitations. See *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (holding that orcas lacked constitutional standing under the Thirteenth Amendment); see also *Animal Legal Defense Fund v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994) (determining that human plaintiffs lacked prudential standing to challenge a regulation promulgated under the Animal Welfare Act). In addition, ambiguously written statutes and explicitly restrictive statutes also give way to denials of standing. See *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (holding that monkeys lack statutory standing under the Copyright Act); see also the Animal Welfare Act (AWA) (explicitly limiting enforcement of the Act to the Secretary of Agriculture). This existing state of affairs in the legal world is especially salient in animal advocacy litigation, the success of which relies on broad constructions of standing and well-written statutes that generously confer it.

I. STANDING DOCTRINE:

ORIGINS OF THE MODERN ARTICLE III STANDING TEST

Standing is the constitutional requirement that the plaintiff must be the proper party to bring the lawsuit. See generally *Allen v. Wright*, 468 U.S. 737 (1984). To constitute the proper party to bring the lawsuit, a plaintiff must assert a "*personal* injury fairly traceable to the defendant's allegedly wrongful conduct and likely to be redressed by the requested relief." *Id*. at

751 (emphasis added). Without standing, a plaintiff cannot invoke the power of a federal court to decide the merits of a dispute, *even if a plaintiff's claims are meritorious*. See *New England Anti-Vivisection Society v. United States Fish & Wildlife Service*, 208 F. Supp. 3d 142, 176 (D.D.C. 2016) (refusing to reach the merits of the case despite agreeing with plaintiffs that the "FWS's broad interpretation appears to thwart the dynamic of environmental protection that Congress plainly intended"). Because standing is a limitation on which cases a federal court can decide, standing can be understood as a *jurisdictional* limitation on the judicial branch. Put more simply, standing is what gets a plaintiff's "foot in the door" in federal court.

Although the standing requirement is a constitutional requirement, one may be surprised to learn that the concept of "standing" is not explicitly mentioned anywhere in the U.S. Constitution. Rather, the standing requirement is derived from Article III of the Constitution, which grants federal courts the jurisdiction to exercise "judicial Power" in various "Cases" or "Controversies."[1] It is from construing this language that judges have historically read a standing requirement into the Constitution, starting in the 1920s.[2] Article III standing doctrine continued

[1] U.S. Cont. art. III, § 2, cl. 2 provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

It is worth noting here that "Cases" and "Controversies" are not defined in the Constitution.

[2] Standing doctrine can be traced back to two Supreme Court cases in the 1920s: *Fairchild v. Hughes*, 258 U.S. 126 (1922) and *Massachusetts v. Mellon*, 262 U.S. 447 (1923). In *Fairchild v. Hughes*, the Court held that a plaintiff seeking to challenge the District of Columbia's ratification of the Nineteenth Amendment did not have a general right to sue to invalidate a prospective statute. *Fairchild*, 258 U.S. at 129-130. In *Massachusetts v. Mellon*, the Court held that plaintiffs seeking to challenge the constitutionality of expenditures of the federal government needed to show that they have "sustained or [are] immediately in danger of sustaining some direct injury" from the challenged law. *Mellon*, 262 U.S. at 448.

to evolve throughout the twentieth century[3] and developed into its modern formulation in 1992 in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), where the Supreme Court articulated the factors necessary to meet the "injury-in-fact" requirement for constitutional standing.

In *Lujan*, environmental conservation organizations sued the Department of the Interior for concluding that the Endangered Species Act (ESA) did not apply to activities of the U.S. government in foreign countries.[4] *Id.* at 557-58. Plaintiffs were specifically concerned with federally funded activities in Egypt and Sri Lanka which would, respectively, threaten the endangered Nile crocodile and endangered Asian Elephant. *Id*. at 563-64. To establish standing, the organizations alleged that their members were suffering aesthetic injury resulting from visiting the areas where the government-funded activities were occurring,[5] and submitted affidavits attesting to how they had previously observed certain endangered animals in their habitats abroad, and that they intended to return to these countries in the future to observe the endangered animals, which would be injured or diminished in number as a result of the federally funded activities. *Id.* at 564. However, when deposed by the Defendants, the members of the Plaintiff organizations were unable to state precisely *when* they would return to the countries.

Writing for a plurality of the Court, Justice Scalia first conceded that the plaintiffs' asserted aesthetic injury was a legally cognizable interest. *Id*. at 562-63. However, he went on to

[3] See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (articulating that "Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision").
[4] More specifically, Defenders of Wildlife contested the Secretary of the Interior's revised interpretation of §7(a)(2) the ESA. §7(a)(2) requires federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Services (NMFS) before taking actions that may affect endangered species. The original interpretation of §7(a)(2) required agency consultation for actions taken in the United States *and* abroad; The revised interpretation required consultation only for actions taken in the United States or high seas. The issue of whether the ESA applies extraterritorially was never reached in *Lujan* because of the Court's determination that plaintiffs lacked Article III standing.
[5] Alleging that they would suffer aesthetic harm when they visited a government project area in the future that they claimed would suffer environmental damage.

explain that despite asserting a legally cognizable interest, plaintiffs lacked standing for failing to assert that such aesthetic injury was "actual or imminent." *Id*. at 564 (explaining that "'some day' intentions — without any description of concrete plans, or indeed even any specification of when the some day will be — do not support a finding of the '*actual or imminent'* injury that our cases require") (emphasis added). The *Lujan* Court then articulated the modern Article III standing test that is comprised of three requirements: first, the plaintiff must suffer an "injury in fact" which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual and imminent[6]; second, the injury has to be fairly traceable to the challenged action of the defendant[7]; third, it must be "likely" that the injury will be redressed by a favorable decision. *Id.* at 560-61.

In offering its new Article III standing test, the Court emphasized the importance of the Constitution's separation of powers framework, explaining:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts v. Mellon*, 262 U.S. at 489, and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'" *Allen v. Wright*, 468 U.S. 737, 760 (1984) (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

Id. at 577. It is out of this concern of legislative overreach into executive authority that the Court concluded that Article III standing requires more than just a showing of a legally cognizable injury—a claimant must show that whatever "injury-in-fact" is at issue is either present, imminent, or continuing—i.e., past injury does not suffice for standing purposed.

[6] It is important to note that, in a case footnote, Justice Scalia noted that Congress can relax the immediacy and redressability requirements through the establishment of a procedural right to protect a concrete interest. *Id.* at 572 n.7. Nonetheless, the injury-in-fact requirements remain a high bar for any claimant to satisfy.
[7] *Ibid.*

II. LEVERAGING JUSTICIABLE HUMAN INTERESTS AS A PROXY FOR ANIMAL INTERESTS UNDER THE MODERN ARTICLE III STANDING TEST

The only justiciable injuries are injuries-in-fact to humans. This is because animals are denied both constitutional and statutory standing as a result of an entirely human-centric Constitution[8] and American legal system. But see *Cetacean Community v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004) (explaining that Article III "does not compel the conclusion that a statutorily authorized suit in the name of an animal is not a "case or controversy").

Animals lack standing under the Constitution because they are not considered "legal persons," see *Tilikum,* 842 F. Supp. 2d at 1259 (holding that the Thirteenth Amendment's prohibition on slavery only applies to humans), and lack statutory standing where statutes have not expressly granted standing to animals. *Naruto,* 888 F.3d at 426 (explaining that "[i]f the statute does not so plainly state, then animals do not have statutory standing"). Moreover, animals are viewed as property in the eyes of the law and therefore devoid of legal rights.[9] *Id.* at 428 (providing that under "basic property law, animals have no such rights [to statutory standing]"). Because animals lack legal rights, animal advocates are also precluded from claiming third-party standing on behalf of animals. See Fed. R. Civ. P. 17(c) (requiring that a representative may sue on behalf of a "person"); see also *Naruto,* 888 F.3d at 425 n.7.

Despite such a hostile legal landscape for animal plaintiffs, animal advocates have adopted several different strategies to obtain legal protection for animal interests. One legal strategy has been to continue to fight for having animals recognized as named plaintiffs. See *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 176 N.Y.S.3d 533, 538 (2022) (urging the

[8] Nowhere in the U.S. Constitution are animals mentioned. Compare this to the constitutional provisions of Switzerland, India, Brazil, Slovenia, Germany, Luxembourg, Austria, and Egypt.
[9] For a compelling argument as to why animals should be conferred standing, *see* "Should Trees Have Standing?" by Professor Christopher Stone. Oddly enough, courts have held that corporations and trusts do qualify as legal persons.

Court of Appeals of New York to recognize an elephant as a legal person subject to the protections of the writ of habeas corpus). Another, more common, legal strategy has been to leverage justiciable human interests in federal courts as a *proxy for animal interests*. Legally cognizable injuries to humans, however, are not boundless—they are limited by traditions of common law and the changing judicial philosophies of the courts. These barriers to establishing standing in federal court are detailed in the sections below.

A. Legally Cognizable Interests: A Historical Overview

Article III standing requires more than just a showing of a legally cognizable injury—a claimant must show an "injury-in-fact." See generally, *Data Processing*, 397 U.S. 150 (1970). But what injuries are legally cognizable? Legally cognizable injuries were traditionally rooted in common law prior to the advent of the administrative state, and experienced a broad expansion during the 1960s and 1970s. This expansion has since slowed down following the *Lujan* decision in 1992. The section that follows describes the historical evolution of legally cognizable interests, and how that has proceeded to shape the injuries-in-fact asserted by animal welfare advocates today.

i. Justiciable Injuries Before the Advent of the Administrative State

During the early twentieth century, legally cognizable interests were limited to liberty and property interests traditionally protected at common law.[10] This common law conception of legally cognizable interests significantly limited the pool of litigants eligible to challenge agency actions in court during the early period of administrative regulation in the U.S.[11] Whereas *regulated corporations and persons* were permitted to challenge agency actions as violations of their common law interests, *regulatory beneficiaries* (third parties that were not themselves

[10] *See* Sunstein, *Standing and the Privatization of Public Law*, 88 Colum.L.Rev. 1432, 1435 (1988).
[11] *Id.* at 1435.

subject to agency regulation) were prevented from challenging agency actions because their asserted injuries in the public interest did not resemble those recognized at common law. This created an asymmetry in who was permitted to bring a cause of action to the courts: litigants seeking *relief* from regulation had standing, but litigants seeking *enforcement* of regulation did not.

It was not until the advent of the administrative state, coupled with the passage of statutes protecting public interests that expanded beyond those accepted at common law, that the Supreme Court began to permit regulatory beneficiaries to challenge agency actions. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (granting standing to represent the "public interest" in the enforcement of the Communications Act); see also *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942) (recognizing that "private litigants have standing only as representatives of the public interest"). These decisions were later bolstered by the passage of Section 702 of the Administrative Procedure Act (APA) in 1946, which granted standing to a person "aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, thereby codifying standing for *statutorily protected interests.*

ii. The Expansion of Justiciable Injuries during the 1960s and 1970s

The expansion of legally cognizable interests and the role of the judiciary culminated with the decisions of the Warren Court[12] in the 1960s. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (recognizing the widely shared interests of voters challenging the malapportionment of the state legislature); see also *School District v. Schempp*, 374 U.S. 203 (1963) (recognizing the widely shared interests of public-school students challenging school prayer). The Warren Court

[12] *See generally* Horwitz, *The Warren Court and The Pursuit of Justice*, 50 Wash. & Lee L.Rev. 5 (1993) (characterizing the Warren Court as a period in the history of the Supreme Court from 1953 to 1969 defined by its expansion of civil rights and role of the judiciary).

multiplied legally cognizable interests by expanding the Court's understanding of substantive constitutional rights, and awarding remedies that were increasingly divergent from those granted under traditional common law. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

Following the Warren Court, the Burger Court of the 1970s continued to recognize statutory rights created by Congress. See, e.g., *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) (replacing the "legal interest" test with "injury-in-fact" test); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (suggesting that injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing"); *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (recognizing that "where a dispute is otherwise justiciable, the question of whether the litigant is a 'proper party to request an adjudication of a particular issue,' is one within the power of Congress to determine").

The Supreme Court's trend of enlarging the class of plaintiffs who may challenge administrative action during this period is best exemplified by *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), where data processing services challenged an agency ruling that allowed national banks to provide data processing services. There, the petitioners did not sustain the invasion of a "legal right" arising out of a statute or common law. *Id*. at 153. Nevertheless, the Court held that the petitioners satisfied standing requirements by showing an economic injury-in-fact from the agency ruling, *id*. at 154, an actual injury that flows from the challenged action – in that case the competitive harm that would ensue if banks were allowed to provide data processing services. The Court further explained that as long as that injury-in-fact is within the "*zone of interest* to be protected or regulated by" the Bank Service Corporation Act pursuant to Section 702 of the APA, the injury was cognizable for *prudential* standing purposes (to be discussed later in this paper). *Id*. at 153 (emphasis added). In short, the

Court in *Data Processing* concluded that one does not need a legally protected right arising out of a statute or common law to have an injury sufficient for Article III standing—rather, all that is required is an "injury-in-fact" that is also within the relevant zone of interest of the statute at issue.

iii. The Contraction of Justiciable Injuries Beginning with the Rehnquist Court

Although the 1960s and 1970s witnessed an expansion of legally cognizable injuries, starting in the mid-1980s the Rehnquist Court began to issue a line of decisions that severely cabined the Supreme Court's prior liberal treatment of standing.[13] See, e.g., *Allen,* 468 U.S. at 755 (requiring concrete and personalized injury for Article III standing and holding that individuals have "no standing to complain that their Government is violating the law"); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (stating "judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show 'injury in fact'"); *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986) (elaborating that "Article III requires more than a desire to vindicate value interests…It requires an 'injury in fact' that distinguishes 'a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem'").

It was during the era of the Rehnquist Court that the seminal case for modern Article III standing doctrine was born: *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In addition to articulating the modern Article III standing test discussed previously, *Lujan* marked the first time in history the Supreme Court clearly declined to find standing despite a cause of action conferred

[13] *See* Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 Ind.L.J. 551 (2012) (noting that modern courts are increasingly filtering out progressive interest group causes of action).

by an act of Congress—i.e., permitted by way of a statutory "citizen suit" provision--foreshadowing future Supreme Court jurisprudence defined by skepticism toward legally cognizable interests conferred by statutes.[14] It is against this historical backdrop that animal advocates struggle to derive justiciable interests from both common law and federal statutes.

B. Key Legally Cognizable Interests in Animal Law: Aesthetic, Procedural, and Informational Injury

i. Aesthetic Injury

An aesthetic injury can include witnessing environmental degradation, the inhumane treatment of animals, and a diminished opportunity to view animals. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986). Harm to aesthetic interests is sufficient to constitute a legally cognizable injury, provided that the party seeking review is among the injured. To demonstrate aesthetic injury, a plaintiff must demonstrate direct sensory impact as a result of what they have seen or will see. *Lujan*, 504 U.S. at 566 (emphasizing that the plaintiff must be roughly "in the vicinity" of the injury).

The Supreme Court first recognized an aesthetic interest in *Data Processing*, 397 U.S. 150, 154 (1970) (providing that an injury "may reflect 'aesthetical, conservational, and recreational,' as well as economic values") (quoting *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 616). The Court went on to recognize conservational aesthetic interests in *Sierra Club v. Morton*, 405 U.S. 727 (1972), discussed below, and acknowledge an aesthetic interest in the observation of animals in *Lujan*, 504 U.S. at 562-63.

[14] *Id.*

In *Morton*, the Sierra Club brought suit against the United States Forest Service (USFS) for approving a permit for the construction of a ski resort in Mineral King Valley, a game refuge adjacent to Sequoia National Forest. *Id*. at 730. The Sierra Club claimed a "special interest in the conservation and sound maintenance of the national parks, games refuges and forests of the country," and invoked judicial review under Section 702 of the Administrative Procedure Act (APA). *Id*. The Court ultimately ruled that the plaintiff lacked standing for failing to articulate how its *members* would be affected by the agency's actions, but, citing *Data Processing*, the *Morton* Court nevertheless recognized that aesthetic injury is sufficient to lay the basis for standing under Section 702 of the APA. *Id*. at 734.

Following *Data Processing* and *Morton*, aesthetic injury continues to be recognized as a legally cognizable injury. See, e.g., *Lujan*, 504 U.S. at 562-563 (explaining that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing"); *Glickman*, 154 F.3d at 431 (recognizing an aesthetic interest in observing animals under human conditions); *ASPCA v. Ringling Bros. & Barnum & Bailey*, 317 F.3d 334, 337 (D.C. Cir. 2003) (finding aesthetic injury where a plaintiff cannot attend the circus due to the inhumane treatment of elephants).

Although federal courts recognize aesthetic interest as a legally cognizable injury, this injury is limited in its availability. For example, knowledge of mistreatment alone is not sufficient for aesthetic injury—the plaintiff must experience an impact on their senses. See *Glickman*, 154 F.3d at 432 (upholding standing where Plaintiff alleged what he was observing was an "assault on [his] senses.") This sensory requirement is especially frustrating in the animal law advocacy context because many animal welfare violations occur behind closed doors and high fences (e.g., research labs, factory farms). Consequently, when animal legal advocates seek

to assert an aesthetic injury in court, they often rely on insiders who have direct contact with mistreated animals and experience aesthetic injury firsthand. See *Alternatives Research & Development Foundation v. Glickman*, 101 F. Supp. 2d 7 (D.D.C. 2000) (granting standing where a plaintiff member was a psychology student that participated in laboratory experiments involving rats). This logistical hurdle in asserting aesthetic injuries has subsequently led animal legal advocates to explore alternative injuries.

* * *

Aesthetic injury is an example of a cognizable legal injury as a result of developments in the common law. However, cognizable legal injuries can also be created by Congress by statute. As noted in *Lujan*, "Congress may 'eleva[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate at law." *Lujan*, 504 U.S. at 578. Consider procedural and informational injuries below.

ii. Procedural Injury

Procedural injury occurs when a government agency's action (or lack thereof) violates the agency's statutory obligations. Congress can accord a procedural right to protect a plaintiff's concrete interest (e.g., to challenge agency action unlawfully withheld). Procedural injuries are "special" in that they do not have to meet all the normal standards for redressability and immediacy required to assert an injury-in-fact. *Lujan*, 504 U.S. at 572, n.7. Rather, if there is *some possibility* that a plaintiff's requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the plaintiff, the plaintiff has standing. *Id*.

Massachusetts v. EPA, 549 U.S. 497 (2007) is a seminal example of how procedural injuries are recognized and evaluated in the federal court system. There, the Supreme Court granted the state of Massachusetts standing to challenge a refusal by the Environmental

Protection Agency (EPA) to issue regulations governing greenhouse gas emissions by new motor vehicles. Writing for the majority, Justice Stevens reasoned that Congress had authorized "this type of challenge to EPA action." *Id*. at 516. He emphasized that the CAA conferred upon parties the "procedural right" to challenge the EPA's denial of the state of Massachusetts's petition to promulgate emission standards and added that "a litigant to whom Congress has 'accorded a procedural right to protect his interests'—here the right to challenge agency action unlawfully withheld—'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id*. at 517 (quoting *Lujan*, 504 U.S. at 572, n.7).

Justice Stevens next clarified that a plaintiff asserting a procedural right "'never has to prove that if they had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was *connected* to the substantive result.'" *Id*. at 518 (quoting *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 94-95 (CADC 2002) (emphasis added). In so holding, the decision in *Massachusetts v. EPA* highlights the utility of asserting procedural injuries in federal court to assert an injury-in-fact. Of course, in such cases, if the Plaintiff prevails, it only gets the process to which it is entitled. The court in such cases cannot provide the Plaintiff with any additional substantive relief – i.e. it cannot rule on the merits of the what the outcome of the process should be. See *FEC v. Akins*, 524 U.S. 11 (1998) (providing that "[if] a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case — even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason"); see also *Cronin v. United States Department of Agriculture*, 919 F.2d 439, 444 (7th Cir. 1990) (suggesting that where an agency has failed to consider all relevant factors or

has not articulated a convincing rationale for its action, the proper remedy is a remand to the agency rather than an evidentiary hearing).

iii. Informational Injury

A plaintiff suffers an informational injury when the plaintiff fails to be provided information that must be publicly disclosed pursuant to a statute. *Federal Election Commission v. Akins*, 524 U.S. 11, 21 (1998). If the statute requires the disclosure without a request, the plaintiff need not request such information for there to be informational injury. See *Animal Legal Defense Fund v. United States Department of Agriculture*, 935 F.3d 858, 867–868 (9th Cir. 2019). To constitute an injury-in-fact, the denial of information must have had an adverse effect on the plaintiff. In addition, the harm must have been the type of the statute was designed to prevent. See *Election Privacy Information Center. v. Presidential Advisory Commission on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017).

The Freedom of Information Act (FOIA) is an "information-forcing" statute commonly used in animal legal advocacy. See *Center for Biological Diversity v. United States Fish & Wildlife Service*, 802 F. App'x 309, 311 (9th Cir. 2020); see also *Humane Society International v. United States Fish & Wildlife Service*, Civil Action No. 16-720 (TJK), 2021 U.S. Dist. LEXIS 59429 (D.D.C. Mar. 29, 2021). FOIA requires federal agencies to make certain agency records available for public inspection in an electronic format. 5 U.S.C.S. § 552(a)(2). The Supreme Court has explained that FOIA provides standing where informational injury is present. *Public Citizen v. Department of Justice*, 491 U.S. 428, 449 (1989).

In *Animal Legal Defense Fund v. United States Department of Agriculture*, 935 F.3d 858, 875 (9th Cir. 2019), the Court determined that ALDF was injured by the USDA's removal of documents from an online reading room. The Court explained that "[a] plaintiff sustains a

cognizable informational injury in fact when agency action cuts her off from "information which must be publicly disclosed." *Id*. at 867. Moreover, the court found that ALDF suffered the kind of harm Congress sought to prevent because "[FOIA] was designed to create a broad right of access to 'official information'" and "is particularly concerned with records that 'shed [] light on an agency's performance of its statutory duties." *Id*. at 868 (quoting *Reporters Commission of Freedo*m *of the Press*, 489 U.S. 749, 772-773). This case exemplifies how informational injury can be a viable theory for animal legal advocates to seek redress in cases where government agencies refuse to provide information vital to a legal nonprofit's mission.

Unfortunately, recent Supreme Court jurisprudence has since cast doubt on whether an informational injury alone is enough to constitute an injury-in-fact. In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). There, plaintiffs asserted informational injuries caused by information storage errors by a credit reporting agency. *TransUnion*, 141 S. Ct. at 2213. The Court proceeded to reject the majority of plaintiff claims for failure to satisfy standing, asserting that "informational injury that causes no adverse effects cannot satisfy Article III." *Id.* at. 2214. Additional ramifications of the Supreme Court's holding in *TransUnion* will be explored in further detail in the section below.

C. The Injury-in-Fact Requirement

To establish standing, a plaintiff must have suffered an "injury-in-fact" which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual and imminent. The following sections examine each necessary element of the "injury-in-fact" requirement in greater detail.

i. Concrete and Particularized Injuries

Following the modern Article III standing test articulated in *Lujan*, lower courts encountered much uncertainty concerning how to apply the "concrete and particularized" requirement of an injury-in-fact. See, e.g, *Spokeo v. Robins*, 578 U.S. 330, 334 (2016) (having to reiterate that an injury-in-fact must be both concrete *and* particularized); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (failing to address concreteness and particularity altogether); *Massachusetts v. EPA*, 549 U.S. 497 (failing to explain how global warming constitutes a "concrete and particularized" harm).

For an injury to be particularized, it must "affect the plaintiff in a person and individual way." *Lujan*, 504 U.S. at 560 n.1; see also *Spokeo*, 578 U.S. at 339 (explaining that violations of an individual's statutory rights are sufficiently particularized). As for "concreteness," a court must "assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2204.

In *TransUnion LLC v. Ramirez*, a plaintiff class comprised of 8,185 members brought a class action against TransUnion, a credit reporting agency which incorrectly flagged them as potential terrorists, drug traffickers, or serious criminals. *Id.* at 2209. Out of 8,185 class members, 1,835 of them had false credit reports sent to third parties. *Id.* at 2200. The remaining 6,332 class members had false credit reports only sent to them. *Id.* Justice Kavanaugh, writing for the Court, held that only the class members that had false credit reports sent to third parties had Article III standing because the mere presence of an inaccuracy in a credit card file, without any attendant harm from the dissemination of the information, caused no "concrete" harm. *Id.*

In explaining what constitutes a concrete harm for the purpose of standing, Justice Kavanaugh explained that a reviewing court should examine whether the alleged injury has a "close historical or common-law analogue for their asserted injury." *Id.* at 2204. Importantly, the Court clarified that Congress's judgment that a harm merits a legal remedy may be "instructive," but that it is ultimately up to the court whether the harm is in fact sufficiently concrete. *Id.* Indeed, Justice Kavanaugh proceeded to emphasize that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *Id.* (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (CA6 2018).

TransUnion is the latest word from the Supreme Court on Article III standing. Importantly, it establishes that the invasion of a statutory right alone may not be enough for standing; because the violation of a statutory right granted by Congress must also cause an injury that is "concrete" in the eyes of the court, plaintiffs must also show that they are actually injured because of the violation of their statutory right. Finally, the future ramifications of the Court's holding *TransUnion* remains uncertain as it has been subjected to substantial criticism from both conservative and liberal legal scholars.[15] It remains to be seen how much reliance the Supreme Court will impose on historical and common-law analogues for future asserted injuries.

ii. Actual and Imminent Injuries

An injury-in-fact must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). It does not include *past* harm. *Lujan*, 504, U.S. at 5645. Courts have recognized that "although imminence is concededly a

[15] For a conservative critique of *TransUnion*, see Phillips, *TransUnion, Article III, and Expanding the Judicial Role*, 23 Federalist Society Rev. (2022). For a liberal critique of *TransUnion*, see Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 Sup. Ct. Rev. 349 (2021).

somewhat elastic concept…its purpose [is] to ensure that alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013) (quoting *Lujan*, 504 U.S. at 565, n.2. "'Some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564. Therefore, "allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 158). Given this requirement, animal legal advocates are well advised to bolster their description of concrete plans to satisfy the imminence requirement to establish an injury-in-fact. See *Lujan*, 504 U.S. at 592 (requiring "description of concrete plans" such as a "plane ticket" to establish imminence).

The "actual and imminent" requirement is also particularly consequential in the environmental conservation context, where cause and effect are frequently spread over large spatial and temporal dimensions, and environmental harm is not necessarily linear.[16] So far, claims asserting climate change as an injury have satisfied the "actual and imminent" requirement. See *Massachusetts*, 549 U.S. at 521 (finding "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'"). It remains to be seen whether such favorable treatment of climate change as "actual and imminent" will continue. See *Conservation Law Foundation, Inc. v. Gulf Oil Ltd. Partnership*, No. 3:21-CV-00932 (SVN), 2022 U.S. Dist. LEXIS 177034, at *26-27 (D. Conn. Sep. 29, 2022) (finding "[b]ecause the complaint fails to plausibly suggest that the impacts of climate change will imminently result in injury to Plaintiff's members or that there is a substantial risk that such harm will occur, Plaintiff lacks standing").

[16] Environmental harm isn't always obvious until a certain threshold is reached. For example, one degree of temperature could be all the difference between a thriving and dead coral reef.

D. The Causation and Redressability Requirements

In addition to suffering an injury-in-fact, a plaintiff's injury must be (1) fairly traceable to the challenged action of the defendant and (2) likely redressed by a favorable decision by the court. When the injuries asserted by plaintiffs are procedural, they do not have to meet all the normal standards for redressability and immediacy required to assert an injury-in-fact— if there is *some possibility* that a plaintiff's requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the plaintiff, the plaintiff has standing. *Lujan*, 504 U.S. at 572, n.7.

Causation and redressability concerns are often triggered in the context of animal law advocacy when plaintiffs are seeking to regulate the actions of third parties. See *American Federation of Government Employees v. Vilsack*, 118 F. Supp. 3d 292 (2015); see also *Center for Biological Diversity v. Bernhardt*, 592 F. Supp. 3d 845 (D. Ariz. 2022). This is because "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction — and perhaps on the response of others as well"—making it difficult for plaintiffs to demonstrate that asserted injury arises from the government. *Lujan*, 504 U.S. at 562; see *Vilsack*, 118 F. Supp. 3d at 299. Moreover, the Supreme Court has "made clear [that] when a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to prove that the plaintiff has standing to sue. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 204 (D.D.C. 2014) (citing *Lujan*, 504 U.S. at 562).

This difficulty is well illustrated by *Center for Biological Diversity v. Bernhardt*, 592 F. Supp. 3d 845 (D. Ariz. 2022). There, the Center for Biological Diversity brought suit against the FWS for adopting "a rule allowing for the import of sport-hunted leopard trophies," alleging that

sport hunters decisions to hunt leopards for trophies [were] at least substantially motivated by FWS's issuance of import permits." *Id.* at 849-850. The Court ultimately held that the plaintiffs sufficiently alleged causation and redressability by plausibly alleging that challenged import permits were prerequisites to the trophy hunts for leopards. *Id.* at 855. The Court explained that "[c]ausation and redressability do not exist when an injury is the result of 'unfettered choices made by independent actors not before the courts.'" *Id.* (quoting Lujan, 504 U.S. at 562). However, the court then noted that the plaintiff can "offer facts showing that the government's unlawful conduct 'is at least a substantial factor motivating the third parties' actions'" to establish causation. *Id.* (quoting *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014)).

Although the conclusion reached in *Bernhardt* was favorable to animal advocacy plaintiffs, the case illustrates the typical chain of causation animal legal advocates must establish when seeking to regulate the activity of third parties. Unfortunately, not all fact patterns are clear enough to demonstrate but-for causation, and animal legal advocates are advised to be strategic about which injuries to assert as a result of government regulation (or lack thereof). See *American Federation of Government Employees v. Vilsack*, 118 F. Supp. 3d 292 (D.D.C. 2015) (failing to find causation between an agency rule that regulates poultry slaughter establishments and adulterated poultry that will ultimately harm plaintiffs as consumers).

III. ORGANIZATIONAL STANDING

Organizations, in addition to individuals, can serve as plaintiffs in federal court. *Equal Rights Center v. Post Properties, Inc*. 633 F.3d 1136, 1138 (D.C. Cir. 2011) (providing that an organization can "asser[t] standing on its own behalf, on behalf of its members or both"); see also *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 413 (1977) (explaining the requirements for membership standing). This plaintiff strategy can be particularly useful in the

animal advocacy context where individual plaintiffs can be difficult to source given how many animal welfare violations take place behind closed doors and high fences.

To establish standing, an organization is subject to the same injury-in-fact requirements as an individual plaintiff. *Havens Realty Corporation v. Coleman,* 455 U.S. 363, 378-79 (1982) (explaining that in the case of organizational standing, courts "conduct the same inquiry as in the case of an individual"). In other words, an organization must satisfy Article III standing requirements. To determine whether an organization suffers a "concrete and demonstrable" injury to its own interests, as opposed to those of its members, courts ask (1) whether a government agency's action or omission to act "injured the [organization's] interest," and (2) whether the organization "used its resources to counteract that harm." *Equal Rights Center,* 633 F.3d at 1140. Courts do not recognize injuries to organizations when it is a "self-inflicted budgetary choice" such as the "diversion of resources to litigation or to investigation in anticipation of litigation." *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.,* 659 F.3d 13, 25 (D.C. Cir. 2011). Nor do courts recognize injuries that affect an organization's "lobbying activities." *Americans for Safe Access v. Drug Enforcement Agency,* 706 F.3d 438, 457 (D.C. Cir. 2013). By contrast, the Supreme Court has recognized that a "drain on the organization's resources constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty,* 455 U.S. at 379.

The utility of organizational standing in the context of animal advocacy litigation is well illustrated by *People for the Ethical Treatment of Animals v. United States Department of Agriulture.*, 418 U.S. App. D.C. 223 (2015). There, People for the Ethical Treatment of Animals (PETA) sued the USDA, arguing that its inaction concerning crafting bird-specific animal welfare regulation amounted to agency action "unlawfully withheld" in violation of Section

706(1) of the APA. *Id.* at 1091. As to standing, the Court held that PETA satisfied organizational standing. *Id.* at 1094. In so finding, it looked to PETA's mission to prevent "cruelty and inhumane treatment of animals," and noted how one of the ways in which the organization pursued its mission was by "educating the public" by "providing information about the conditions of animals held by particular exhibitors." *Id.* The Court then explained how USDA's inaction prevented PETA from accessing information about the conditions of animals, thereby denying PETA the very information it relies on to educate the public and fulfill its mission. *Id.* In other words, USDA's lack of action constituted a resource drain on PETA's resources, thereby establishing sufficient injury for standing.

To date, the analysis concerning establishing organizational standing has been neither sanctioned nor overruled by the Supreme Court, and organizational standing is undoubtedly a valuable tool to protect animal interests in federal court. The most recent Supreme Court jurisprudence concerning standing (see *TransUnion*) in general suggests that our increasingly textualist Court may have future reservations about organizational theories of standing. However, until that time, animal advocacy organizations are well advised to assert standing on both their own behalf and on behalf of their members when pursuing litigation.

IV. CAUSES OF ACTION: CITIZEN SUIT PROVISIONS AND SECTION 702 OF THE ADMINISTRATIVE PROCEDURE ACT

Commonly asserted injuries by animal legal advocacy plaintiffs include aesthetic, procedural, and informational injury, and these legally cognizable injuries are made judicially reviewable with the aid of either citizen suit provisions or Section 702 of the APA where citizen suit provisions are not available. Two keystone federal statutes in the animal advocacy context,

the Endangered Species Act (ESA) and the Animal Welfare Act (AWA), illustrate how citizen suit provisions and the APA enable judicial review of legally cognizable injuries.

i. Citizen Suit Provisions

Citizen suit provisions authorize suits against government agencies, as well as private citizens. The concept is that individuals may serve as "private attorney generals" to vindicate important environmental and other public interests. The ESA is one of several environmental statutes that provide an explicit citizen suit provision. See also, e.g., Clean Water Act, 33 U.S.C.S. § 1311(a) (1972); Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1365 (1995); Clean Air Act, 42 U.S.C. §§ 7604, 9659 (2000). The ESA prohibits federal action that would jeopardize the continued existence of a listed species or destroy its critical habitat, and also prohibits the "taking" of any such species by any person. 16 U.S.C. § 1538(a)(1)(B). It includes a citizen suit provision that authorizes broad challenges to violations of the ESA and its implementing regulations. See 16 U.S.C. § 1540(g)(1) (citizen may "commence a civil suit on his own behalf…to enjoin any person" in violation of "any provision" of ESA). The ESA is precisely what created a cause of action in *Lujan*.

The CWA is another statute that provides an explicit citizen suit provision. The CWA is aimed at restoring and maintaining the "chemical, physical, and biological integrity of the nation's waters." 33 U.S.C.S. § 1251(a). To achieve its purpose, the CWA prohibits the discharge of pollutants from a point source absent a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C.S. § 1311(a). The CWA includes a citizen suit provision that authorizes citizen suits against holders of a National Pollutant Discharge Elimination System permit for alleged noncompliance with the permit. 33 U.S.C.S. § 1365(a).

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167 (2000), the Supreme Court allowed a citizen suit under the CWA to go forward after determining that petitioners had standing. In that case, environmental groups brought suit against the owner of a hazardous waste facility. *Id.* at 175. Writing for the Court, Justice Ginsburg determined that the hazardous waste facility's discharges and petitioners' "reasonable concerns about the effects of those discharges, directly affected petitioners' recreational, aesthetic, and economic interests." *Id.* at 183-84. The Court went on to explain that the civil penalties sought by petitioners satisfied the remaining redressability concerns of injury-in-fact because such "civil penalties have some deterrent effect." *Id.* at 185 (quoting *Hudson v. United States*, 522 U.S. 93, 102). Importantly, this case was the first time the Supreme Court found that having to *refrain* from enjoying a recreational resource out of concerns about pollution constitutes a cognizable injury-in-fact for purposes of standing. *Laidlaw* is an excellent example of how citizen suits allow litigants to assert their cognizable legal interests against private parties, as well as the government.

ii. Section 702 of the Administrative Procedure Act

When citizen suits provisions are not written into the text of a statute, Section 702 of the APA provides litigants a cause of action to those "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. §702. To invoke a cause of action under Section 702, a plaintiff must also establish that the injury asserted falls "arguably within the *zone of interests* sought to be protected or regulated by the statute." *Data Processing*, 397 U.S. at 153 (emphasis added).

The "zone of interests" test uses "traditional tools of statutory interpretation" to determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's

claim." *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). Under the APA, the test is not "especially demanding," and forecloses suit "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). Detailed descriptions of a statute's purpose can be especially helpful in this regard. *Lexmark*, 572 U.S. at 131.

The AWA, which does not contain an explicit citizen suit, demonstrates the necessity of Section 702 of the APA to enable judicial review of legally cognizable injuries. The AWA provides for the humane treatment of animals, requiring the Secretary of the Department of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. §2143(a)(1). In addition, the law provides for criminal penalties, civil penalties, and revocation of permits for violations of the AWA. 7 U.S.C. §2149. However, the AWA contains a major obstacle to realizing its promised legal remedies: the legal rights proscribed by the AWA can only be vindicated by the Secretary of Agriculture. *Id*. Because only the Secretary may bring a case to enforce the AWA, the opportunity to catch, litigate, and ultimately correct violations of the AWA is severely limited. One way to enforce the AWA, however, has been to use Section 702 of the APA to sue the Unites States Department of Agriculture (USDA) for violating a provision of the statute. This technique is well illustrated by the case *Animal Legal Defense Fund v. Glickman,* 154 F.3d 426 (D.C. Cir. 1998) (en banc).

In *Glickman*, several individual plaintiffs and the Animal Legal Defense Fund (ALDF) sued the USDA under Section 702 of the APA for failure to adequately adopt "specific,

minimum standards to protect primates' psychological well-being." *Id.* at 430. There, the D.C. Circuit determined that one of the plaintiffs, Marc Jurnove, had standing to sue as a result of witnessing the inhumane living conditions of specific animals at the Long Island Game Farm Park and Zoo. *Id.* at 431. Jurnove established a continuing aesthetic injury by demonstrating his personal bond with a particular primate at the zoo. He visited the zoo repeatedly to visit the animals at issue, and alleged in his standing declaration that he was going to "continue visiting the Farm to see the animals." *Id.* at 430. In light of these facts, the Court explained that Jurnove's "aesthetic interest" was legally cognizable and that that he "allegedly suffered aesthetic injury upon observing conditions that the… USDA regulations permit[ed]." *Id.* at 438. The Court then determined that the causation and redressability prongs of Jurnove's asserted aesthetic injury were satisfied because USDA's "regulations allow[ed] the conditions that allegedly caused Mr. Jurnove injury," *id.* at 439, and because "more stringent regulations…would necessarily alleviate Mr. Jurnove's aesthetic injury during his planned, future trips to the Game Farm." *Id.* at 443.

Glickman is especially significant in that it was the first case to establish standing to protect animals in captivity. This was made possible because the Court recognized that an individual's personal bond with an animal establishes standing to sue the USDA for failing to issue the regulations required pursuant to AWA. If the plaintiffs in *Glickman* hadn't established Jurnove's bond to the animals, the injury-in-fact requirement would not have been satisfied and standing would most probably have been denied—persons who do have a bond with, or know, animals in captivity do not suffer from aesthetic injuries from witnessing such animals. See *Hill v. Coggins*, 867 F.3d 499, 505 (4th Cir. 2017) (explaining that the invasion of an anesthetic injury must be "real, non-speculative, and *personal*") (emphasis added). The Court's holding in *Glickman*, therefore, does not only illustrate how cognizable legal interests are granted judicial

review with the assistance of Section 702 of the APA, but also how plaintiffs can establish standing to protect animals in captivity.

V. BEYOND CONSTITUTIONAL STANDING: PRUDENTIAL LIMITATIONS ON STANDING

The Article III "case or controversy" requirement is a minimum constitutional requirement, but there are also judicially created restrictions on federal court access known as *prudential limitations* on standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Even when the constitutional elements of standing are satisfied, federal courts can still decline to hear a case for failure to satisfy prudential requirements. See *FMC Corp. v. Boesky*, 852 F.2d 981, 987 (7th Cir. 1988). Prudential limitations on standing are "judicially self-imposed limits on the exercise of federal jurisdiction" that prohibit the adjudication of "generalized grievances" and "raising another person's legal rights" *Elk Grove Unified School District. v. Newdow*, 542 U.S. 1, 11-12 (2004) (quoting *Allen*, 468 U.S. at 751). The "zone-of-interests" test discussed in the previous section is one example of a prudential limitation. Prudential limitations are imposed by courts to ensure that the plaintiff is asserting their own legal rights and interests, and not the legal rights of third parties not before the courts. *Id.* at 12. It is in this way that prudential standing requirements cut against third party standing and statutorily granted causes of action.

Prudential limitations could be consequential for animal legal advocates one day if animals are eventually recognized as plaintiffs with legal rights of their own. Even if animals are recognized as rightful plaintiffs, prudential limitations must be overcome to assert third party standing on behalf of animals. This problem is well illustrated by *Elk Grove Unified School District. v. Newdow*, 542 U.S. 1 (2004), where a divorced father of a child in school that commenced each day with a required Pledge of Allegiance contended that the words "under

God" were unconstitutional, and violated the Establishment and Free Exercise Clauses of the First Amendment. There, the Court determined that the noncustodial father lacked prudential standing. Writing for the Court, Justice Stevens emphasized his concern that "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict." *Id*. at 15. In so holding, the Court expressed its hesitancy for finding prudential standing where the rights of third parties are implicated and those third parties, where are not before the court, cannot express their preferences for which rights they would like to assert. This, of course, has direct implications for third-party standing on behalf of animals when such a practice is one day permitted.

Recent development in third-party standing cases foreshadow an even great contraction in third-party standing. See *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103, 2167(Alito, J. dissenting) (emphasizing the "seriousness of conflicts of interest in the specific context of third-party claims"); see also *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2275 (2022) (criticizing the Supreme Court's practice of ignoring third-party standing doctrine). Accordingly, animal rights advocacy organizations have much to lose if the future Supreme Court jurisprudence cuts back on third-party standing.

VI. THE PATH FORWARD: A CRITIQUE OF MODERN ARTICLE III STANDING AND A PROPOSED SOLUTION

There are historical, structural, and functional arguments for why the Supreme Court's current jurisprudence surrounding Article III standing doctrine is indefensible. Historically, standing doctrine as currently conceived does not stretch back to this nation's founding. The concept of "standing" is nowhere to be found in the Constitution, and has at best been tenuously derived from Article III's description of "Cases" or "Controversies." Indeed, as detailed

previously, courts only became self-conscious about standing after the advent of the administrative state during the twentieth century. The modern Article III standing test articulated in *Lujan* took standing requirements one step further by articulating the temporal and specificity requirements for an "injury-in-fact," and clearly rejecting for the first time in Supreme Court history statutory standing conferred by an act of Congress. History, therefore, demonstrates that the modern Article III standing test is neither grounded in history nor precedent from before the late twentieth century.

Structurally, the modern Article III standing test undermines the separation-of-powers framework established by the Constitution. Congress has a duty to articulate the interests of the People through legislation; the "injury-in-fact" requirement rejects the independent sufficiency of legally cognizable injuries articulated by Congress that have been historically recognized prior to *Lujan*. This was made especially clear by the latest word from the Supreme Court on Article III standing in *TransUnion*. By appearing to give courts the discretion to veto statutory rights that do not have historical, common law analogies, *TransUnion* may have dramatically restricted standing to sue pursuant to legal rights articulated in federal statutes (although the actual application of *TransUnion* in federal courts remains to be seen). In doing so, it has effectively usurped Congress of its legislative authority and responsibility to articulate legal rights.

Functionally, the modern Article III standing test makes it difficult for animal advocates to vindicate animal interests in federal court. Litigating animal interests in federal court is already difficult given the human-centric Constitution, which effectively denies recognition of animals as "persons" deserving of legal rights. In addition, most of the legally cognizable interests relied upon by legal advocates are statutorily conferred, which may have now been further eroded by *TransUnion*, which appears to require a concrete injury in *addition* to a mere

violation of a statutory right.. Finally, the modern Article III standing test is ill-suited for injuries to the environment and animals, which are often spread across space and time.

In addition to the aforementioned challenges to animal legal advocacy, current Supreme Court jurisprudence is trending toward a contraction of statutory rights and third-party standing. Considering current and potential future challenges to establishing standing, animal advocates must remain resilient and creative in their legal strategies in the event their current paths to standing are invalidated by future Supreme Court jurisprudence. The following section offers one promising litigation strategy.

A. Next Friend Standing

"Next friend" standing is a promising mechanism by which animal plaintiffs could have their cases brought to court. A "next friend" is a self-nominated party to represent the claims of the named plaintiff. *Naruto*, 888 F.3d at 421. Rule 17(c) of the Federal Rules of Civil Procedure[17] authorizes representatives for incompetent or incapacitated persons: general guardians, committees, conservators, guardian ad litem, and next friends. "Next friends," unlike the other types of representatives, do not have to be appointed by either the principal or the court. Rather, they are self-nominated representatives deeply interested in a plaintiff's case.

There are two prerequisites to establish "next friend" standing: A "next friend" must (1) "provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability— why the real party in interest cannot appear on his own behalf" and (2) "be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *Whitmore v.*

[17] Fed. R. Civ. P. 17(c):

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Arkansas, 495 U.S. 149, 163 (1990). Furthermore, it has been suggested that they must have "some significant relationship with the real party in interest." *Id.* at 164.

Thus far federal courts have been reluctant to recognize "next friend" standing. See, e.g., *Tilikum,* 842 F. Supp. 2d 1259 (noting that the "next friends" bringing a case on behalf of orcas do not have standing because orcas have no private right of action); *Naruto*, 888 F.3d 418 (denying PETA "next friend" status on behalf of monkeys): *Palila,* 852 F.2d 1106 (denying the Sierra Club, National Audubon Society, Hawaii Audubon Society "next friend" standing on behalf of the Palila bird)."

In *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), the Ninth Circuit listed a number of concerns surrounding "next friend" standing. There, PETA asserted "next friend" status on behalf of a monkey to bring a copyright suit against a wildlife photographer that published said monkey's sefies. *Naruto,* 888 F.3d at 420. The court held that PETA could not assert "next friend" status because "(1) PETA has failed to allege any facts to establish the required significant relationship between a next friend and a real party in interest and (2) because an animal cannot be represented, under our laws, by a 'next friend.'" *Id*. at 421. The court went on to explain that PETA did not have a relationship with Naruto the monkey "any more significant than its relationship with any other animal." *Id*. Furthermore, the court clarified that even if a significant relationship existed, Congress has not authorized "next friend" lawsuits on behalf on animals in the statute at issue (the Copyright Act). *Id*. at 422.

The concurrence in *Naruto* went even further, maintaining that because "next friend" standing presupposes that the named plaintiff has suffered an Article III injury, "next friend" standing can never be asserted on behalf of animal, which is not recognized as a plaintiff with

legal rights under U.S. law. *Id*. at 429. Lastly, the concurrence explained the public policy concerns associated with "next friend" standing, providing:

> Animal-next-friend standing is particularly susceptible to abuse… Institutional actors could simply claim some form of relationship to the animal or object to obtain standing and use it to advance their own institutional goals with no means to curtail those actions…Animal-next-friend standing is materially different from a competent person representing an incompetent person. We have millennia of experience understanding the interests and desire of humankind. This is not necessarily true for animals. Because the "real party in interest" can actually never credibly articulate its interests or goals, next-friend standing for animals is left at the mercy of the institutional actor to advance its own interests, which it imputes to the animal or object with no accountability.

Id. at 432.

Despite the arguments and policy concerns articulated against "next friend" standing, this strategy should not be abandoned by animal legal advocates— there are compelling rebuttals for policy concerns against "next friend" standing. Furthermore, even if current federal law is incompatible with "next friend" theories of standing, state courts are promising, suitable venues for this legal mechanism.

First, the distinction courts draw between "next friend" standing for animals and "next friend" standing for persons with disabilities is flawed as well as deeply troubling. While it is true an animal cannot articulate its interests or goals verbally in human language, the very same can be said of a person that is severely disabled or in a coma. *The legal system nevertheless respects the legal interests of the latter* because we can make a reasonable prediction about their desires. The very same reasonable predictions can be made of animals through objective, scientific observations of the natural world.

Although animals cannot articulate their specific interests in human language, current science supports the premise that at the very least animals have a deep biological interest in survival, pain avoidance, and the need to engage in their natural behaviors. Surely, these

assumptions of an animal's interest are more factually accurate than the courts' current default assumption that an animal does not have any of them. To suggest that an animal has no interest in its own survival, welfare, or the conservation of its natural habitat *because it cannot verbalize those interests* is not only willfully ignorant, but also unethical.

Second, under state law, much of the doctrinal standing concerns articulated against "next friend" standing in federal courts fall to the wayside. Although animals do not have legal rights (and therefore can never have Article III standing) under *federal* law, state law concerning the personhood of animals is not so unalterable. For example, the Oregon legislature already recognizes that animals are sentient and have the ability to experience pain, stress, fear, and suffering. *Justice v. Vercher,* 518 P.3d 131, 142 (Or. Ct. App. 2022). Similar legislation has been introduced to New York City.[18] State legislatures could very well amend state laws to recognize animals as a "person" or a legal entity. They could also create limited statutory causes of action allowing a person to sue on behalf of an animals in specific instances. See *Deckard v. Bunch*, 370 P3d 478 (2016). These solutions would solve the "personhood problem" for "next friend" standing.

CONCLUSION

A legal right is only as substantive as the availability of its legal remedy. In the context of animal law, modern Article III standing requirements are arguably the most significant legal obstacle animal advocates must overcome to obtain legal remedies. Modern courts frequently impose standing requirements using restrictive interpretations of the Constitution and statutes, and prudential requirements. This existing state of affairs is especially harmful to animal advocacy litigation because the success of such advocacy efforts relies on broad constructions of

[18] *See* Animal Legal Defense Fund, *Recognizing Animal Sentience (New York City)* https://aldf.org/project/recognizing-animal-sentience-new-york-city/

standing and well-written statutes that generously confer it. The reliance interests of animal advocates on statutory rights are significant due to the modern Article III standing test, but the utility of such statutory rights has been endangered by recent Supreme Court jurisprudence. Animal advocates are well advised to look to state courts and legislatures to assert novel theories of standing, where they will likely encounter more success than they have in federal courts.

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WRITING SAMPLE

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As a student attorney at the Animal Law & Policy Clinic, I prepared the attached memorandum for our client, the Center for Biological Diversity, for the pending case *Center for Biological Diversity v. United States Fish and Wildlife Service,* 4:21CV00465. The memorandum examines whether information concerning the import and export of wildlife data collected by the Fish and Wildlife Service is shielded from mandatory disclosure to the public under the Freedom of Information Act. This writing sample was edited only by me.

To: Katherine Meyer
From: Barbara Tsao
Date: April 19, 2022
Re: Center for Biological Diversity—FOIA Exemption 4 Claim

Purpose

This memo examines the question of whether the LEMIS information at issue in our pending case concerning the import and export of wildlife falls under Exemption 4 of the Freedom of Information Act (FOIA) in light of the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

The Plaintiff, the Center for Biological Diversity ("the Center"), filed a complaint in the District of Arizona seeking an order to compel prompt disclosure of information that Defendant, the Fish and Wildlife Service ("FWS" or "the Service"), collected between 2016 and 2020 concerning the import and export of wildlife as part of its Law Enforcement Management Information System ("LEMIS"). On February 8, 2022, the parties filed a Joint Stipulation, approved by the Court, to hold the FOIA action in abeyance until **May 6, 2022,** to provide FWS time to produce the LEMIS data at issue. It is expected that FWS will withhold significant portions of LEMIS data under Exemption 4 of FOIA, which shields "confidential commercial information" from disclosure.

Case law concerning Exemption 4 focuses on the question of whether the information withheld by the government is "confidential." We have reasonable arguments (and later, hopefully, evidence) to establish that the government's records are not "confidential" and therefore not protected by Exemption 4, even within the meaning of the new test established by the *Argus Leader* decision.

Because this case takes place in the 9th Circuit and similar litigation has taken place in the D.C. Circuit, this memo exclusively analyzes case law from the 9th Circuit and D.C. Circuit.

Facts

A. The Information at Issue

FWS collects data from importers and exporters concerning the import and export of wildlife, which is provided on mandatory wildlife declarations on USFWS Form 3-177. USFWS Form 3-177 includes information concerning (1) the date and purpose of the export; (2) the species' name, country of origin, and quantity of specimens imported or exported; (3) the port of import or export; and (4) the names of importers, exporters, and carriers. 50 C.F.R. §§ 14.61, 14.63. This information is then gathered and inputted by FWS into its LEMIS database.

LEMIS wildlife import and export data have been historically released to FOIA requesters, but since 2016, FWS stopped disclosing much of it under Exemption 4 of FOIA. Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4).

B. The Importance of the Information

LEMIS data are used by the public to track which species of wildlife the Service allows to enter and leave the United States, from where, by and to whom, and in what quantity. Given the significant role of U.S. demand for wildlife and plants and their products, and the fact that the United States is the only country globally that tracks in detail all wildlife crossing its borders, the LEMIS data are globally unique and critical to the conservation of species.

The Center advocates for the protection of threatened, endangered, and rare species throughout the United States and abroad. The LEMIS data helps the Center identify which species are most affected by trade, monitor illegal trade, determine whether the United States is meeting its legal obligations (e.g., trade quotas), and seek international and domestic protections for such species as needed.

The Service's failure to disclose LEMIS data precludes the Center from understanding the type, quantity, purpose, and other important information about wildlife and plant imports and exports that the Service allows into and out of the United States. By not releasing the LEMIS data, the Service impairs the Center's ability to carry out its work to conserve and protect foreign species, and to work with other NGOs around the world to accomplish these objectives.

C. The Specific Information at Issue

The current Complaint includes FOIA Requests made by the Center on **January 31, 2019** (for LEMIS data generated between January 1, 2016, through December 31, 2018), on **April 2, 2020** (for LEMIS data generated between January 1, 2019, and December 31, 2019), and on **February 4, 2021** (for LEMIS data generated between January 1, 2020, and December 31, 2020). Thus, the Requests at issue cover all LEMIS data generated from January 1, 2016 to December 31, 2020.

The Center seeks information recorded in the following LEMIS database columns:

(a) Control number,
(b) Species name,
(c) Wildlife description,
(d) Quantity/unit/number of cartons,
(e) Country of origin,
(f) Country of import/export,
(g) Purpose code,
(h) Source code,
(i) Action (cleared or refused),
(j) Disposition,
(k) Date of import/export,
(l) Whether specimen is an import or export,
(m) Port,
(n) Transport mode,
(o) U.S. importer/exporter name, and
(p) Foreign importer/exporter name.

The Complaint claims that the Center has a statutory right of access to the LEMIS data it requested under FOIA, and that there is no lawful basis for the Service's withholding of this information. Therefore, the Service's failure to disclose the LEMIS data responsive to the Center's FOIA Requests violates FOIA, 5 U.S.C. 552(a)(3), and results in informational injury to Plaintiff.

D. Pertinent Developments Since Filing the Complaint

On **February 28, 2022,** FWS provided a partial release of LEMIS data that included millions of pieces of information over 10 separate Excel files. FWS later asserted that this batch of data inadvertently included many items that were supposed to be withheld under Exemption 4.

On **March 7, 2022,** Plaintiff submitted an updated FOIA Request for LEMIS data generated in 2021.

On **March 18, 2022,** the government sent Plaintiff a formal "claw back" letter, requesting that the Center promptly return, sequester, or destroy the files and provide the government with contact information concerning anyone outside of the Center that may have accessed such information so that the government could request that such entities also return and destroy the LEMIS data.

On **March 23, 2022**, the government requested a three-week extension for the final LEMIS data document production that would move the release to April 21, 2022.

On **April 11, 2022,** the Animal Law and Policy Clinic on the Center's behalf sent a response to the "claw back" letter, asserting that it was willing to continue to sequester all of the LEMIS data it was provided *pending receipt of a corrected data set*, but that it was not currently willing to destroy or return this information (because the agency has not yet identified which information was inadvertently disclosed), nor was it willing to identify persons or organizations who may have accessed the data, nor to contact all such individuals or organizations to request that the data be retrieved, returned, or destroyed. The letter also explained that the LEMIS data had been downloaded and made publicly available to individuals and organizations throughout the world *before* the Service notified the Center that it had inadvertently released some of the data and requested that it be returned.

Issue

1. Are the LEMIS data at issue "commercial or financial information" under Exemption 4?
2. Are the LEMIS data at issue "confidential" under Exemption 4?

Brief Answer

1. **Probably yes.** The LEMIS data at issue are likely "commercial" information under Exemption 4.

Courts have broadly construed the term "commercial" under Exemption 4 of FOIA to include any information that pertains to trade or commerce. See *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (explaining that the term "commercial" under Exemption 4 should be given its ordinary meaning). Consistent with this interpretation, courts have found information to be "commercial" under Exemption 4 when "the provider of the information has a commercial interest in the information submitted to the agency." *Baker & Hostetler LLP v. U.S. Department of Commerce*, 473 F.3d 312, 319 (D.C. Cir.

2006). Such information can include both "records that actually reveal basic commercial operations," *Public Citizen*, 975 F. Supp. 2d at 99, as well as "information that reveals 'favorable' (or unfavorable) 'market conditions' that, if disclosed, 'would help rivals to identify and exploit [a] company[y's] competitive weaknesses.'" *Renewable Fuels Association & Growth Energy v. United States Environmental Protection Agency*, 519 F. Supp. 3d 1, 8 (D.D.C. 2021) (quoting *Baker & Hostetler LLP*, 473 F.3d at 319).

The LEMIS information sought in the Center's Complaint arguably includes information that, if disclosed, could help rivals identify and exploit a company's competitive weakness (e.g., ports, exporter/importer name, purpose code, etc.). As such, the LEMIS data are likely "commercial."

2. **Likely no.** The LEMIS data at issue are likely not "confidential" under Exemption 4.

In *Argus Leader*, the Supreme Court held that Exemption 4 applies to commercial or financial information that is: (1) "both customarily and actually treated as private by its owner" and (2) "provided to the government under an assurance of privacy." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2359 (2019). Importantly, the Court in *Argus Leader* declined to analyze whether establishing only the first prong satisfies the definition of "confidential." *Id.* at 2363.

While it remains unclear whether both prongs must be satisfied for commercial information to fall under Exemption 4, we nevertheless have a strong argument that the Service did not provide importers and exporters with the requisite assurance of privacy to qualify for confidentiality. This is because courts have held that data submitted on forms with privacy disclosures lose their confidential character. *Public Justice Foundation v. Farm Service Agency*, 538 F. Supp. 3d 934, 942 (N.D. Cal. 2021) (explaining that a government application providing "a warning that under some circumstances, information will be disclosed," is not an assurance of confidentiality).

The LEMIS data at issue in this case were collected on two different versions of USFWS Form 3-177, depending on the date on which such data was collected. The version of the form used prior to 2017 included a Privacy Act Notice that stated the information collected "may be subject to disclosure under the Freedom of Information Act." The amended version of the form used since 2017 similarly states that the collected information is "used to respond to requests under the Freedom of Information Act." In sum, both versions of USFWS Form 3-177 used to collect the LEMIS data at issue in this case explicitly disclaim confidentiality and subsequently disqualify such data from Exemption 4 protection.

Statutory Authority Governing Exemption 4 under FOIA

FOIA requires that "each agency, upon any request for records . . . shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3). Under FOIA, an agency may withhold information only if it qualifies under one of nine statutory exemptions. 5 U.S.C. § 552(b)(1)–(9). The agency bears the burden of proving that the information qualifies for an exemption and may therefore be lawfully withheld. *Id.* § 552(a)(4)(B).

LEMIS Exemption 4 Memorandum

Under FOIA Exemption 4, an agency may **withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential."** 5 U.S.C. § 552(b)(4). "Person" is defined in FOIA to include corporations, partnerships, associations, and other private organizations. See 5 U.S.C. § 551(2).

Therefore, to succeed on an Exemption 4 claim, the government must satisfy three conditions:

(1) that the information is a trade secret, commercial, or financial
(2) that the information is obtained from a person
(3) that the information is privileged or confidential

Exemption 4 FOIA cases typically hinge on establishing the third condition: confidentiality. Substantial case law addresses how to evaluate whether information is "confidential" as construed under Exemption 4. The most recent test for determining "confidentiality" is enumerated in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

Analysis of Exemption 4 in *Argus Leader* and Following Judicial Decisions

A. LEMIS cases prior to *Argus Leader*

Prior to June 2019, courts applied a narrow interpretation of "confidential" in FOIA Exemption 4 cases. This interpretation was established in *National Parks & Conservation Association v. Morton*, which articulated a "substantial harm test" to determine whether information submitted to the government was "confidential" under Exemption 4. *National Parks & Conservation Association v. Morton* 498 F.2d 765, 770 (D.C. Cir. 1974).

Under the "substantial harm test," information was "confidential" if disclosure of such information would either: (1) impair the Government's ability to obtain necessary information in the future; OR (2) cause *substantial harm* to the competitive position of the person from whom the information was obtained. *Id.* Generalized allegations of substantial competitive harm could not support an agency's decision to withhold request documents. *Id.* Rather, the government was required to demonstrate that there was (1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released. *Id.*

The "substantial harm test" imposed a high burden on the government in FOIA Exemption 4 cases and was particularly favorable for information requesters in LEMIS cases. See *Center for Biological Diversity v. United States Fish & Wildlife Service,* No. CV-16-00527-TUC-BGM, 2018 U.S. Dist. LEXIS 55551, at *25-26 (D. Ariz. Mar. 30, 2018) (finding FWS failed to meet "its burden of showing a potential of substantial competitive harm" and ordering it to provide documents responsive to the plaintiff's FOIA request). However, courts have since adopted a less restrictive test to determine "confidentiality" following the Supreme Court's ruling in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). After *Argus Leader*, the "substantial harm test" is no longer the operative test for determining "confidentiality" under Exemption 4.

B. The New FOIA Exemption 4 Test under *Argus Leader*

Courts now apply the two-part test articulated by the Supreme Court in *Argus Leader* to determine if information is "confidential." Under this test, Exemption 4 applies to commercial or financial information that is: (1) "both customarily and actually treated as private by its owner" and (2) "provided to the government under an assurance of privacy." *Argus Leader Media*, 139 S. Ct. at 2359. The Court has declined to analyze whether satisfying only the first prong satisfies the definition of "confidential." *Id.* at 2363.

In *Argus Leader*, a trade association requested from the Department of Agriculture (USDA) the names and addresses of all retail stores that participated in the Supplemental Nutrition Assistance Program (SNAP), and each retail store's annual SNAP redemption data. *Id*. at 2361. The USDA released the names and addresses of retail stores that participated in SNAP but declined to disclose the store-level SNAP data, invoking Exemption 4 under FOIA. *Id*.

Applying its new two-part test, the Court determined that the SNAP data were (1) customarily and actually treated as private and (2) the government provided an assurance of privacy to the retail stores. *Id.* at 2366. In other words, the store-level SNAP data was found to be "confidential." Concerning prong one, the retail stores at issue in that case customarily did not disclose store-level SNAP data, and only small groups of employees had access to the SNAP data within each company. *Id.* at 2363. Regarding prong two, the Court noted that to induce retailers to participate in SNAP and provide store-level information, the government had a practice of promising retailers that it would keep this information private. *Id.*

The Court justified its new two-part test by citing concerns about arbitrarily constricting the application of Exemption 4 by requiring limitations found nowhere in the language of the statute. *Id.* at 2360. It further emphasized the importance of finding a "workable balance" between disclosure and government interest in private party cooperation under FOIA. *Id.* at 2366. At bottom, the *Argus Leader* Court discarded the "substantial competitive harm" test in favor of a new two-part test more consistent with the ordinary public meaning of "confidential" and ultimately less stringent than the prior standard for demonstrating confidentiality under Exemption 4.

C. LEMIS cases following *Argus Leader*

LEMIS cases following *Argus Leader* have thus far been favorable to FOIA requesters. To date, third-party objectors to FOIA information requests for LEMIS data have failed to demonstrate that they customarily and actually keep the data private. In addition, the Service's historical practice of disclosing LEMIS data has weighed against a finding that LEMIS data is "confidential" under Exemption 4.

Two LEMIS cases have followed the Supreme Court's ruling in *Argus Leader*: (1) *Center for Biological Diversity v. United States Fish & Wildlife Service*, 802 F. App'x 309, 311 (9th Cir. 2020) and (2) *Humane Society International v. United States Fish & Wildlife Service,* Civil Action No. 16-720 (TJK), 2021 U.S. Dist. LEXIS 59429 (D.D.C. Mar. 29, 2021).

In the first case, *Center for Biological Diversity v. United States Fish & Wildlife Service*, a district decision ruled in the FOIA requester's favor under the prior "substantial competitive injury" test. However, *Argus Leader* was decided while the case was pending on appeal, and, accordingly, the 9th Circuit remanded the case to the district court for a new determination applying the new test for confidentiality. By that point, because the FOIA requester had received most of the information it wanted, it dropped the suit. Accordingly, no further decision was required.

In *Humane Society International v. United States Fish & Wildlife Service,* the Humane Society International (HSI) requested LEMIS data from the Service. In response to such request to the Service, over one hundred separate objections from third parties were submitted to the court claiming that their information was exempt under Exception 4. *Humane Society International*, Civil Action No. 16-720 (TJK), 2021 U.S. Dist. LEXIS 59429, at *16 (D.D.C. Mar. 29, 2021).

Applying the two-part test from *Argus Leader*, the court determined that the vast majority of the third-party objections were conclusory and "did not attest to specific facts indicating how each objector treats the relevant data," thereby failing the first part of the test. *Id.* at *11. Furthermore, because all such data were collected on a version of USFWS Form 3-177 that included a disclaimer to confidentiality, the data also failed the second part of the test. *Id.* at *15-16. Moreover, the Service's prior decade-long historical practice of releasing LEMIS data also weighed against finding confidentiality. *Id.* at *16. All in all, the court determined that the LEMIS records at issue were not "confidential" and therefore not protected from disclosure under Exemption 4.

Note: It remains untested in the court system how the newest version of USFWS Form 3-177 will affect the assurance of privacy analysis. Up until 2016, the USFWS Form 3-177 stated that "the requested information may be subject to disclosure under provisions of the Freedom of Information Act (U.S.C. 552)." The disclaimer language has since been amended in 2017—it now similarly states that "information collected is also used to respond to requests made under the Freedom of Information Act and the Privacy Act of 1974."

Because the new disclaimer language still warns submitters that the government might disclose information pursuant to a FOIA request, future assurance of privacy analysis determinations will probably still weigh in FOIA requesters' favor. However, if the Service later amends USFWS Form 3-177 to no longer include a privacy disclaimer, it is likely future LEMIS cases will turn on whether third-party objectors can attest to specific facts that they customarily and actually keep the data private.

D. Analysis of Exemption 4 following *Argus Leader*

1. Widely shared information is not "customarily and actually kept private" under the first step of the *Argus Leader* two-part test.

Evidence of "confidentiality" under Exemption 4 following *Argus Leader* includes: "(1) requiring employees and business partners to enter into confidentiality agreements; (2) using restrictive markings on documents and communications; (3) using secure, password-protected IT

networks for the information at issue; and/or (4) limiting access to the information at issue on a 'need to know' basis." *Center for Investigative Reporting v. United States Department of Labor*, 470 F. Supp. 3d 1096, 1113 (N.D. Cal. 2020). On the other hand, evidence contrary to "confidentiality" includes postings of information to largely accessible locations and required disclosure of information to a large number of employees. *Id.* at 1108-14.

The case *Center for Investigative Reporting v. United States Department of Labor* well illustrates how certain practices do not demonstrate that information was "customarily and actually kept private." In that case, the Center for Investigative Reporting requested disclosure of information from the Occupational Safety and Health Administration ("OSHA") under FOIA, seeking to obtain the company Amazon's injury and illness data required on 300A forms provided to OSHA. *Id.* at 1099. OSHA declined to provide the 300A forms following the Supreme Court's decision in *Argus Leader*. *Id*.

Applying the two-part test from *Argus Leader*, the district court determined that the information on the 300A forms were (1) not customarily and actually treated as private, and (2) that the government did not provide an assurance of privacy. *Id.* at 1114. For the first prong, the court was persuaded by the existence of regulations requiring Amazon to post Form 300As at facilities accessible to many employees for three months, *id.* at 1108, as well as regulations requiring Amazon to disclose Form 300A disclosure to current, former, and representatives of employees. *Id.* at 1110.

As for the second prong, the court found that OSHA's public statements at time Amazon originally submitted its Form 300As foreclosed the possibility of an assurance of privacy. *Id.* at 1117. At the time Amazon originally submitted its Form 300As, OSHA's public statements indicated it would publicly post the data. *Id.* at 1105. OSHA also expressly stated in rulemaking in 2016 that it would "post the data" from the electronic submissions of Form 300A "on a publicly accessible Web Site." *Id*. In this statement, OSHA went on to describe the benefits of publishing the data from the Form 300As, including encouraging employers to abate hazards and allowing employees to compare and choose safe workplaces. 81 Fed. Reg. at 29629-631. In sum, Amazon's regulatory obligations for disclosure and OSHA's public notice advertising disclosure did not support a finding that the information on the Form 300As were "confidential."

Note: It is currently unclear how widely and for how long data postings must be posted to weigh against confidentiality. See *Center for Auto Safety v. National Highway Traffic Safety Administration*, 93 F. Supp. 2d 1, 17-18 (D.D.C. 2000) (holding that "[l]imited disclosures, such as to suppliers or employees, do not preclude protection under Exemption 4, as long as those disclosures are *not made to the general public*") (emphasis added). Current case law also suggests there is a difference between a required data posting that lasts for three months (at issue here) versus for only one month. See *OSHA Data/CIH, Inc. v. United States DOL*, 220 F.3d 153, 163 n.25 (3d Cir. 2000); *New York Times Company v. United States Department of Labor*, 340 F. Supp. 2d 394, 402 (S.D.N.Y. 2004).

It is likely future determinations concerning whether data were customarily and actually kept private will require an in-depth investigation into exactly how long and how broadly the data was available. This is because the availability of data postings speaks to whether such data was

accessible to a large number of people, which ultimately informs the first step of the *Argus Leader* two-part test.

> 2. Information submitted on forms with privacy disclosures is not "provided to the government under an assurance of privacy" under the second step of the *Argus Leader* two-part test.

Courts have held that data submitted on forms with privacy disclosures lose their confidential character. See, e.g., *Public Justice Foundation v. Farm Service Agency*, 538 F. Supp. 3d 934, 942 (N.D. Cal. 2021) (explaining that a government application providing "a warning that under some circumstances, information will be disclosed," is not an assurance of confidentiality); *Center for Investigative Reporting v. United States Department of Labor*, 470 F. Supp. 3d 1096, 1104 (N.D. Cal. 2020) (discussing how when agency websites or communications explicitly notify submitters of the agency's intention to publicly disseminate the information, the information would be deemed to have lost its confidential character); *Humane Society International v. United States Fish & Wildlife Service,* Civil Action No. 16-720 (TJK), 2021 U.S. Dist. LEXIS 59429, at *16 (D.D.C. Mar. 29, 2021) (finding that a privacy disclosure on Form 3-177 "*disclaimed* confidentiality") (this case is pending on appeal in the D.C. Circuit).

This idea is well illustrated by *Public Justice Foundation v. Farm Service Agency*, in which the court considered FOIA requests submitted by environmental rights groups for information held by the Farm Service Agency ("FSA") regarding federal loans to farmers for the purpose of monitoring compliance with the National Environmental Policy Act ("NEPA"). *Public Justice Foundation*, 538 F. Supp. 3d at 938. In response to these FOIA requests, FSA withheld an Excel spreadsheet of loans, a loan assistance form, promissory notes, and agreements as to the use of proceeds provided by FSA. *Id.* at 941.

The district court ultimately determined that the government failed to provide an assurance of privacy because the loan application provided to the farmers included a privacy disclosure. *Id.* at 942. The disclosure specifically stated that the loan was "made in accordance with the Privacy Act of 1974" and that it "may" disclose information to "government agencies" and "nongovernmental entities that have been authorized access." *Id.* Because FSA failed the second prong of the *Argus Leader* test concerning assurances of privacy, the court did not bother addressing the first prong concerning whether the data were customarily and actually treated as confidential. *Id.* at 943.

Another case example of how privacy disclosures cause data to lose their confidential character is *Humane Society of the United States v. United States Department of Agriculture*. There, the Humane Society submitted a FOIA request seeking information about loans issued to food animal production facilities in certain California counties from the FSA. *Humane Society of the United States v. United States Department of Agriculture*, 549 F. Supp. 3d 76, 79 (D.D.C. 2021). In particular, the Humane Society challenged FSA's decision to not produce a loan recipient's name, address, and operation type; the intended use of the loan; and the documents the agency created during its environmental review of these loans. *Id.* Following this request, FSA invoked several FOIA exemptions and submitted declarations to establish that its loan recipients customarily and actually treat their loan's purpose as privileged and confidential. *Id* at 87.

Once again, just as in *Public Justice Foundation,* the court held that the government failed to provide an assurance of privacy by including a disclosure on the loan application. *Id.* at 90. Furthermore, the court noted that the loan recipients at issue allowed the United States Department of Agriculture (USDA) to identify them on the agency's blog and share details about how they used their loan proceeds. *Id.* at 89. Considering these facts, the court found that the agency's declarations did not establish that borrowers customarily and actually treat their loan's purpose as privileged and confidential, and that the government disclaimed any assurance of confidentiality over this information. Accordingly, the agency did not meet its burden under Exemption 4.

To summarize, privacy disclosures provide much clarity for the second "assurance of privacy" step of the *Argus Leader* two-step test. If privacy disclosures are removed from USFWS Form 3-177 in the future, FOIA requests for LEMIS data will become significantly more fact-intensive inquiries that look beyond the characteristics of the government form used to solicit the information in the first instance. Indeed, without a clear privacy disclosure on a government form, proof of government forfeiture of the confidentiality of information may become far more difficult to demonstrate in court.

3. "An assurance of confidentiality" under the second step of the *Argus Leader* two-part test can be either explicit or implicit.

Assurances of confidentiality do not have to be explicit; Courts have also recognized that "'implied assurances of confidentiality' may be reasonably inferred based on certain 'generic circumstances.'" *American Small Business League v. United States Department of Defense*, 411 F. Supp. 3d 824, 835 (N.D. Cal. 2019) (quoting *United States Department of Justice v. Landano*, 508 U.S. 165, 179) (1993)). Implied assurances of confidentiality can arise from several factors, including: the pattern and practice of behavior on the part of the companies and the government for the duration of the program, the purpose and nature of the government program, the regulations regarding pre-disclosure notification, and the anonymized manner in which information is provided to the public. *American Small Business League*, 411 F. Supp. 3d at 833.

American Small Business League v. United States Department of Defense is an example where information was provided to the government under an *implied* assurance of confidentiality. In that case, the American Small Business League sought the release of documents related to the Department of Defense's ("DOD") Comprehensive Subcontracting Plan Test Program. *Id.* at 827. The DOD sought to withhold approximately 2,000 pages of details related to defense contractors' small business subcontracting relationships, strategies, and goals. *Id.* at 828.

The third-party objectors submitted declarations demonstrating that they were given explicit promises by the DOD that it would treat its proprietary information as confidential, and that they actually kept all of the information confidential in the ordinary course of business because competitors would "obtain substantial insights into the specific business unit with whom they compete on major contract awards." *Id.* at 831, 833. The third-party objectors further demonstrated that they used various methods to protect the information, such as (1) requiring employees and business partners to enter into confidentiality agreements; (2) using restrictive markings on documents and communications (the companies marked comprehensive

subcontracting plans or reports with "restrictive legends identifying the information contained therein as proprietary and confidential"); (3) using secure, password-protected IT networks for the information at issue; and (4) limiting access to the information at issue on a "need to know" basis. *Id* at 831. The government itself also created a secure portal to facilitate intervener's transfer of files containing its subcontracting plan information, received documents from the companies with restrictive markings of confidentiality, held 640 audits in secured facilities with limited access, and destroyed all documents submitted by one of the companies at the conclusion of each audit. *Id*. at 833.

Finally, the DOD provided information concerning to Test Program to Congress in an anonymized manner. *Id.* The Secretary of Defense was required to report annually to Congress "on any negotiated [comprehensive subcontracting plan] that they determined did not meet the subcontracting goals negotiated in the plan for the prior fiscal year." *Id.* at 834. While the actual reports sent to Congress shared the names of the participants in the Test Program, the reports anonymized whether each participant met their socioeconomic goals of the program in the fiscal year. *Id*. The report provided only information concerning the percentage achieved for each overall goal of the program, and provided no further information obtained through the Test Program. *Id*. In this way, the DOD anonymized whether each participant in fact met their socioeconomic goals.

Applying the *Argus Leader* two-part test, the court found that the information was customarily and actually treated as private, and that the government provided the requisite assurance of privacy. *Id.* at 832, 835. The court determined that an *implied* assurance of privacy arose from the pattern and practice of behavior of the companies and government during the Test Program, the purpose and nature of the Test Program, the regulations regarding pre-disclosure notification, and the anonymized manner a narrow subset of this information was provided annually to Congress. *Id.* at 834. In conclusion, documents related to the DOD's Test Program were found to be "confidential" pursuant to an implicit assurance of confidentiality.

Implicit assurances of confidentiality could pose a threat to future FOIA requests for LEMIS data if FWS begins to adopt a pattern and practice of behavior similar to that of the DOD in *American Small Business League.* This is somewhat unlikely to occur at least in the immediate future given the privacy disclaimer included on the current version of USFWS Form 3-177 and the Service's prior decade-long historical practice of releasing LEMIS data.

> 4."An assurance of confidentiality" under the second step of the *Argus Leader* two-part test is implied absent an express statement or clear implication by the agency that it would not keep information private.

Multiple courts have held that an assurance of confidentiality is implied absent an express statement by the agency that it would not keep information private, or a clear implication to that effect (for example, a history of releasing the information at issue). See, e.g., *Renewable Fuels Association & Growth Energy v. United States Environmental Protection Agency*, 519 F. Supp. 3d 1, 12 (D.D.C. 2021); *Gellman v. Department of Homeland Security*, No. 16-cv-635 (CRC), 2020 U.S. Dist. LEXIS 48492, at *32-33 (D.D.C. Mar. 20, 2020) (finding information confidential even where no express or implied assurance of confidentiality was made); *Citizens*

for Responsibility & Ethics in Washington v. United States Department of Commerce, Civil Action No. 1:18-cv-03022 (CJN), 2020 U.S. Dist. LEXIS 146783, at *10-12 (D.D.C. Aug. 14, 2020) (finding implied assurance because the government would lose "trust of the American business community" if it disclosed the information at issue).

The implied assurance of confidentiality is demonstrated by the case *Renewable Fuels Association & Growth Energy v. United States Environmental Protection Agency*. In that case, the Renewable Fuels Association ("RFA") submitted FOIA requests to the Environmental Protection Agency ("EPA") seeking information about oil refineries that had sought regulatory exemptions from EPA's Renewable Fuel Standard Program ("RFS"). *Renewable Fuels Association*, 519 F. Supp. 3d 1, 4. In response, EPA produced small-refinery-exception decision documents but withheld the facilities' locations and the petitioners' names in the documents. *Id.* at 5.

The court ultimately determined that because the EPA offered "nothing approaching a clear agency warning that refinery petitions would be publicly disclosed," the government provided an implied assurance of privacy. *Id.* at 13. This implied assurance of privacy went on the qualify the facilities' locations and the petitioners' names at issue for protection from disclosure under Exemption 4. *Id.*

The implied assurance of confidentiality absent a clear indication to the contrary by an agency in Exemption 4 cases separately emphasizes the importance of the privacy disclosure on USFWS Form 3-177. Without such disclosure, courts could find an implied assurance of privacy to LEMIS data.

Other Considerations

1. Courts construe the term "commercial" broadly under Exemption 4.

To succeed on an Exemption 4 claim, the government must demonstrate that the information at issue is a trade secret, commercial, or financial in nature. 5 U.S.C. § 552(b)(4). While exemption 4 FOIA cases typically hinge on establishing "confidentiality," as described above, sometimes courts also address confusion as to what kind of information qualifies as "commercial."

Courts have construed the term "commercial" under Exemption 4 of FOIA broadly to include any information that pertains to trade or commerce. See *National Association of Home Builders v. Norton* (309 F.3d 26, 38 (D.C. Cir. 2002) (describing information as "commercial" under Exemption 4 when "if, in and of itself, it serves a 'commercial function' or is of a 'commercial nature'") (quoting *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978)); see also *Public Citizen Health Research Group. v. Food & Drug Administration*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (explaining that the term "commercial" under Exemption 4 should be given its ordinary meaning).

Consistent with this interpretation, courts find information to be "commercial" under Exemption 4 when "the provider of the information has a commercial interest in the information submitted to the agency." *Baker & Hostetler LLP v. U.S. Department of Commerce*, 473 F.3d 312, 319

(D.C. Cir. 2006). Such information can include both "records that actually reveal basic commercial operations," *Public Citizen*, 975 F. Supp. 2d at 99, as well as "information that reveals 'favorable' (or unfavorable) 'market conditions' that, if disclosed, 'would help rivals to identify and exploit [a] company[y's] competitive weaknesses." *Renewable Fuels Association*, 519 F. Supp. 3d 1, 8 (D.D.C. 2021) (quoting *Baker & Hostetler LLP*, 473 F.3d 312, 319 (D.C. Cir. 2006)).

In *Besson v. United States Department of Commerce,* the court examined whether an array of confidential information qualified as "commercial." There, the plaintiff filed a FOIA request for a copy of the Cooperative Research and Development Agreement ("CRADA") between the National Institute of Standards and Technology ("NIST") and Ligado Networks. *Besson v. United States DOC*, 480 F. Supp. 3d 105, 110 (D.D.C. 2020). The Department of Commerce ("DOC") withheld the Statement of Work section, other collaborator information in the CRADA, and the names of Ligado Networks employees pursuant to Exemption 4. *Id.* at 109-110.

The district court found that the Statement of Work section and other collaborator information in the CRADA was "both customarily and actually treated as private" by Ligado. *Id. at* 114 (quoting *Argus Leader,* 139 S. Ct. at 2366). The information described monetary and non-monetary contributions made to the project by Ligado and reflected sensitive commercial data that the company did not publicly disclose. *Id*. Furthermore, a declaration by Ligado demonstrated that the company provided its information to NIST under an implied assurance of confidentiality. *Id.* at 115 (describing how NIST "under[stood] that Ligado, like other private sector CRADA partners, [sought] to protect information concerning their commercial products and services"). Considering the preceding facts, the court decided that DOC appropriately invoked Exemption 4 to withhold information concerning the funding and technical equipment contributions Ligado made to the project.

At the same time, the court determined that the defendant failed to demonstrate how the names qualified as "commercial" information. *Id.* at 112-113. Ligado failed to articulate how the mere disclosure of employees' names would provide insight into its business strategy or capabilities, and what commercial consequences would follow. *Id.* at 113. Nor did Ligado demonstrate that it took precautions to keep its employees' identities secret. *Id.* Because the company failed to articulate how revealing its employees' names would lead to commercial consequences, the court found that the defendant improperly invoked Exemption 4 to withhold its employees' names from disclosure.

Besson exemplifies how the broad construction of "commercial" by courts is not without limitation. Information that is not typically associated with trade and commerce must be supported by a reasonable explanation as to why exposure of such information would lead to commercial consequences in order to qualify as "commercial." The LEMIS data at issue in our present case, however, are not an example of an edge case such as *Besson*. The LEMIS information sought by the Center includes information that, if disclosed, could help rivals identify and exploit a company's competitive weakness (e.g., ports, exporter/importer name, purpose code, etc.). As such, the LEMIS data is likely "commercial."

Recommendations

Further information is needed concerning the Service's latest treatment of LEMIS data. Relevant practices to investigate include:

- Whether potential third-party submitters have adopted distinctive practices that suggest the data were customarily and actually kept private. This will be a highly fact-specific inquiry.
- Whether the Service gave explicit assurances of confidentiality to the third-party submitters despite the privacy disclosures included on USFWS Form 3-177.
- Whether the Service has adopted practices that suggest implied assurances of confidentiality to the third-party submitters during the time period at issue in the Complaint.

Applicant Details

First Name	**Erin**
Last Name	**Yonchak**
Citizenship Status	**U. S. Citizen**
Email Address	**yonchak@uchicago.edu**
Address	**Address** Street **5215 S Kimbark Ave.** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**5132059805**

Applicant Education

BA/BS From	**Ohio State University-Columbus**
Date of BA/BS	**December 2016**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Futterman, Craig
futterman@uchicago.edu
773-702-9494

Marbley, The Honorable Algenon L.
algenon_marbley@ohsd.uscourts.gov
(614) 719-3260

Casey, Anthony
ajcasey@uchicago.edu
773-702-9578

Strauss, David
d-strauss@uchicago.edu

References

For additional professional references, please contact (1) Alex Navarro-McKay (former Managing Director at BerlinRosen) at (646) 360-0651 or alexnavarro@gmail.com; (2) Isaac Goldberg (Executive Vice President at BerlinRosen) at (574) 807-1311 or isaac.goldberg@berlinrosen.com; and (3) Helam Gebremariam (my managing partner at Cravath, Swaine & Moore) at (212) 474-1180 or hgebremariam@cravath.com.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Erin Yonchak
5215 S. Kimbark Ave.
Chicago, IL 60615
513-205-9805
yonchak@uchicago.edu

The Honorable P. Casey Pitts
United States District Court
Northern District of California

Dear Judge Pitts,

I am a rising third-year student at the University of Chicago Law School, applying for a clerkship in your chambers for the 2024 or any later term. I am inspired by your background as a civil rights advocate. Like you, I plan to build my legal career in civil rights lawyering—I dream one day to work in the U.S. Department of Justice's Civil Rights division. I am confident that a clerkship under your guidance, as a jurist who has lived the ideals of diligently working for equal justice for all, would provide me with invaluable experience and knowledge that would greatly contribute to my development as a legal professional. In turn, I am hopeful that the experience that I gained in my previous career will make me a unique asset to your chambers.

Prior to law school, I spent four years working at a fast-paced Democratic political consulting firm where I worked my way up the ladder from an entry level position to Senior Account Strategist. In my role, I provided strategic advice and produced paid media for national, statewide, congressional, and local races, ranging in size from Pete Buttigieg's presidential primary campaign to small city council races. I juggled several clients each election cycle, analyzing districts and campaigns across the country. I crafted television, mail, and radio ads to persuade and educate voters. I worked hand-in-hand with Perkins Coie to vet our work and ensure legal compliance. Through my years of work experience, I cultivated an ability to multitask, an acute attention to detail, and strong communication skills that have served me well in law school—and are skills that I will carry into my clerkship.

I left my career in politics to pursue law school because of my work with my favorite client: the Justice and Public Safety PAC (JPS), a George Soros-funded PAC dedicated to reforming the criminal justice system from within. JPS is the brainchild of two former public defenders, Ms. Whitney Tymas and Professor Angela J. Davis, and has spent over $34 million electing dozens of progressive prosecutors across the country, ousting some of the most draconian district attorneys from office, and ushering in a wave of reformers that have changed the narrative about criminal justice and the prosecutorial role. Over the years, I became the lead on the JPS account. The candidates that I helped elect had a clear mission for reform and made change immediately once in office. The incumbents that our work unseated had directly harmed their communities for far too long feeding into mass incarceration, police misconduct, and separating families. I was inspired by this work and left for law school with a mission to find creative ways to use the law as a tool to drive reform and positive change—just as Ms. Tymas and Professor Davis have done through reimagining prosecutorial discretion.

Despite the general sense that law school was the right next move to achieve my aims, I would describe my time in law school as an unexpected love story. I initially anticipated enjoying practice more than academia, but I quickly became enamored with the study of law itself—engrossed in each class with a hunger to learn more. I began law school at UCLA School of Law which afforded me the incredible opportunity to serve as a research assistant as a first-year student. I helped Professor Eugene Volokh draft a motion to intervene in a federal district court case. We opposed the court's grant of

Erin Yonchak
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pseudonymity for a police officer plaintiff challenging his placement on the state's exculpatory evidence list. On appeal now in the First Circuit, if our motion succeeds, the plaintiff must use his real name in federal court. Not only would this reveal the plaintiff's bad behavior as a police officer, it would set a precedent that may discourage petty lawsuits against important checks-and-balances on police misconduct.

Although I loved my time at UCLA (and fell in love with California, to which I am eager to return), for personal reasons related to my family, I opted to complete my law school education at UChicago Law. I have continued to thrive at UChicago, undoubtedly because of the excellent foundational education I received at UCLA. At UChicago, I have continued to actively cultivate skills that will aid me in serving as your clerk. Through my work on the *University of Chicago Law Review*, I have deepened my analogical reasoning, clear writing, and legal research skills. I was honored to have my Comment, *When State Policies Conflict: Parsing What a Federal Court Owes Deference in Remedying an Intrastate Redistricting Stalemate*, selected as one of only sixteen to be published in the *Law Review*. And, after a rigorous interview process, I was selected by my peers to serve as the Executive Managing Editor, the second-in-command role of the *Law Review* which manages all substantive and technical editing for the publication. Meanwhile, through my work with the Police Accountability and Civil Rights Clinic, I have built a set of practical skills through leading a two-year investigation into a claim of police torture against the Chicago Police Department.

Now, I am applying to clerk because I have a passion and fundamental curiosity for the law. I am certain that serving in your chambers will put me in a better position to accomplish my ultimate goal: being in a position to use the law creatively as a tool to drive reform and positive change.

I have enclosed a copy of my resume, transcripts, and writing samples. Letters of recommendation from Deputy Dean Anthony Casey, Professor David Strauss, and the Director of UChicago's Civil Rights and Police Accountability Project, Professor Craig Futterman, will arrive under separate cover. Additionally, I have included a letter from Chief Judge Algenon L. Marbley with whom I had an excellent experience externing last summer. For additional professional references, please contact (1) Alex Navarro-McKay (former Managing Director at BerlinRosen) at (646) 360-0651 or alexnavarro@gmail.com; (2) Isaac Goldberg (Executive Vice President at BerlinRosen) at (574) 807-1311 or isaac.goldberg@berlinrosen.com; and (3) Helam Gebremariam (my managing partner at Cravath, Swaine & Moore) at (212) 474-1180 or hgebremariam@cravath.com.

Should you require additional information, please do not hesitate to let me know. I would greatly appreciate the chance to meet with you to demonstrate my strong interest in clerking in your chambers.

Sincerely,

Erin Yonchak

ERIN YONCHAK

(513) 205-9805 | yonchak@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, IL — July 2022 – June 2024
Juris Doctor expected

- *The University of Chicago Law Review*
  - Executive Managing Editor (vol. 91); Staff Member (vol. 90)
  - Published works:
    - Comment: *When State Policies Conflict: Parsing What a Federal Court Owes Deference in Remedying an Intrastate Redistricting Stalemate*, 90 U. CHI. L. REV. ___ (forthcoming 2023)
    - Essay: *Can Stealthing Qualify? Navigating Rape Exceptions in States' Abortion Bans*, U. CHI. L. REV. ONLINE (March 23, 2023)
- Civil Rights and Police Accountability Clinic
  - Partnering with the Illinois Torture Inquiry and Relief Commission to lead a two-year investigation into a claim of police torture brought against the Chicago Police Department

UCLA School of Law, Los Angeles, CA — August 2021 – July 2022
Juris Doctor candidate

- David J. Epstein Public Interest Law and Policy Scholar
- Research Assistant to Professor Eugene Volokh
  - Assisted with researching and drafting a motion to intervene in a federal court case to oppose the pseudonymity of a police officer challenging the constitutionality of the state's exculpatory evidence list

The Ohio State University, Columbus, OH — August 2013 – December 2016
Bachelor of Arts in Public Affairs and International Relations (dual degrees), Minor in Russian | Magna Cum Laude

- Study Abroad: St. Petersburg State University, St. Petersburg, Russia, May 2014
- Gamma Phi Beta – Beta Xi Chapter Founding Member, Public Relations Vice President, and Philanthropy Chairwoman
- Girls Circle Project Facilitator

PROFESSIONAL EXPERIENCE

Cravath, Swaine & Moore LLP, New York, NY — May 2023 – July 2023
Summer Associate

United States District Court, Southern District of Ohio, Columbus, OH — May 2022 – July 2022
Extern to the Honorable Chief Judge Algenon L. Marbley

- Drafted bench memoranda and orders
- Researched and assisted with the judge's rulings on novel issues of federal and state law

BerlinRosen, New York, NY — July 2017 – July 2021
Senior Account Strategist, January 2021 – July 2021

- Served as the lead consultant for the Justice & Public Safety PAC, a $10 million annual enterprise to elect progressive prosecutors across the country, seeing campaigns through research, polling, and managing the full paid media campaigns
- Managed several New York City municipal campaigns and secured a large congressional campaign as a new client
- Built relationships with potential clients and political criminal justice reform groups nationwide

Client Manager, December 2019 – December 2020

- Served as account lead for general consulting work for the Justice & Public Safety PAC
- Managed the Pete Buttigieg for America mail campaign in Iowa, New Hampshire, Nevada, and South Carolina
- Recruited, onboarded, and oversaw all junior staff members; managed staffing on all 2020 accounts
- Served as a senior strategist on over fifteen 2020 campaigns, spanning from local to statewide campaigns

Associate Account Executive, February 2018 – December 2019

- Assisted in managing primary and general campaign consulting clients, including several congressional races
- Developed paid media, including mail and television, for a variety of campaign, union, and IE clients
- Managed budgets and targeting for political mail, digital, and television programs
- Wrote scripts and produced advertisements for digital, radio, and television

Account Coordinator, July 2017 – February 2018

- Assisted in managing campaign clients for the 2017 election cycle
- Managed direct mail for Virginia legislative races and several New York City Council races

ERIN YONCHAK

(513) 205-9805 | yonchak@uchicago.edu

PROFESSIONAL EXPERIENCE CONTINUED

UN Women, New York, NY — January 2017 – June 2017
Media Relations & Advocacy Intern

- Analyzed UN Women media coverage and gender news globally
- Expanded and maintained the media contact database
- Provided support for media interviews, materials, and communication efforts for CSW61

Ohio Democratic National Committee, Columbus, OH — August 2016 – November 2016
Special Projects Fellow

- Conducted interviews and crafted personal narratives to persuade voters in the 2016 presidential election
- Responded to urgent asks from Hillary for America Headquarters, including story needs for speechwriting, digital and media, and volunteer exempt mail send-outs

Peace Corps, Washington, D.C. — May 2016 – August 2016
Let Girls Learn/Lead Marketing Intern

- Developed and managed communication materials, e-mail list content, and web content, including published stories
- Assisted with ideation and research for the Let Girls Learn Meredith ad campaign
- Created various web pages for the peacecorps.gov site featured in the brand launch

Ohio House of Representatives, Columbus, OH — January 2016 – April 2016
Intern for Minority Leader Fred Strahorn

- Conducted legislative research for the minority leadership of the Ohio House of Representatives
- Corresponded with District 39 constituents and ensured they received personalized assistance and representation

Court Appointed Special Advocates of Franklin County, Columbus, OH — January 2015 – August 2015
Community Outreach and Development Intern

- Updated, researched, wrote, and assisted with presentations and creating a social media plan
- Developed and wrote multicultural, multilingual children's book for explaining the court process to non-English speaking CASA children (translated into three languages: Spanish, Somali, and Russian)
- Experienced, hands-on, the court system surrounding abuse and neglect cases at the Franklin County municipal court

INTERESTS

Walking my two Irish Setters, exploring new restaurants, and cheering on Buckeye football

THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Erin Allison Yonchak
Student ID: 12376445

Scott C. Campbell, University Registrar

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2022
Program Status:Active in Program
J.D. in Law

External Education

Ohio State University
Columbus, Ohio
Bachelor of Arts 2016

CREDIT AWARDED FOR ACADEMIC WORK DONE AT UNIVERSITY OF CALIFORNIA, LOS ANGELES, 2021-2022 39

Beginning of Law School Record

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41501	Conflict of Laws William Baude	3	3	182
LAWS	42301	Business Organizations Anthony Casey	3	3	179
LAWS	53271	Contract Drafting and Review Michelle Drake	3	3	181
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	46101	Administrative Law David A Strauss	3	3	180
LAWS	47201	Criminal Procedure I: The Investigative Process Sharon Fairley	3	3	183
LAWS	63312	Workshop: Regulation of Family, Sex, and Gender Mary Anne Case	1	0	IP
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	182
LAWS	53391	Writing for the Judiciary Ashley Keller Adam Mortara	3	3	182
LAWS	53419	Current Trends in Public Law Scholarship Eric Posner Jonathan Masur	2	2	180
LAWS	63312	Workshop: Regulation of Family, Sex, and Gender Mary Anne Case	1	0	IP
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	2	0	
LAWS	94110	The University of Chicago Law Review Meets Substantial Research Paper Requirement	1	1	P
Req Designation:		Anthony Casey			

Send To: Erin Yonchak
7118 Shadow Ridge Ct
Liberty Twp, OH
45011-6596

End of University of Chicago Law School

Date Issued: 06/02/2023

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see *Doctoral Residence Status.*

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See *Law School Transcript Key* for measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. A quality grade preceded by the mark I indicates an incomplete grade changed to a quality grade. (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). *Law School Transcript Key* for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details, visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Latin Honors: Prior to Academic Year 2020, The College conferred general honors on eligible students. Since that time, The College conferred Latin honors as follows: *cum laude, magna cum laude,* or *summa cum laude.*

7. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma. Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

Law School Transcript Key:

The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)	0.5%
High Honors (180.5+)(pre-2002 180+)	7.2%
Honors (179+)(pre-2002 178+)	22.7%

See *Grading Systems* for the Law School quality grading scheme.

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For additional information and potential updates, visit the Office of the University Registrar website: http://registrar.uchicago.edu.

TO TEST FOR AUTHENTICITY: Translucent globe icons *MUST* be visible from both sides when held toward a light source. The face of this transcript is printed on burgundy SCRIP-SAFE® paper with the name of the institution appearing in white type over the face of the entire document.

UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO•UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO • UNIVERSITY OF CHICAGO •UNIVERSITY

ADDITIONAL TESTS: The institutional name and the word VOID appear on alternate rows as a latent image. When this paper is touched by fresh liquid bleach, an authentic document will stain brown. A black and white or color copy of this document is not an original and should not be accepted as an official institutional document. This document cannot be released to a third party without the written consent of the student. This is in accordance with the Family Educational Rights and Privacy Act of 1974. If you have any questions about this document, please contact our office. ALTERATION OF THIS DOCUMENT MAY BE A CRIMINAL OFFENSE!

200631

SCRIP-SAFE® Security Products, Inc. Cincinnati, OH

NAME: YONCHAK, ERIN ALLISON
UCLA ID: 905667605
BIRTHDATE: 08/16/XXXX

UNIVERSITY OF CALIFORNIA, LOS ANGELES
LAW ACADEMIC TRANSCRIPT

PROGRAM OF STUDY
ADMIT DATE: 08/23/2021
SCHOOL OF LAW
MAJOR: LAW

DEGREES | CERTIFICATES AWARDED
NONE AWARDED

PREVIOUS DEGREES
NONE REPORTED

CALIFORNIA RESIDENCE STATUS: NONRESIDENT

FALL SEMESTER 2021
MAJOR: LAW

INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP
MULTIPLE TERM - IN PROGRESS				
CRIMINAL LAW	LAW 120	4.0	14.8	A-
PROPERTY	LAW 130	4.0	14.8	A-
CIVIL PROCEDURE	LAW 145	4.0	14.8	A-
PUBLIC INTRST WRKSH	LAW 150	0.5	0.0	P

	ATM	PSD	PTS	GPA
TERM TOTAL	13.5	13.5	44.4	3.700

SPRING SEMESTER 2022

CONTRACTS	LAW 100	4.0	14.8	A-
LGL RSRCH & WRITING	LAW 108B	5.0	20.0	A
END OF MULTIPLE TERM COURSE				
TORTS	LAW 140	4.0	16.0	A
CONSTITUT LAW I	LAW 148	4.0	16.0	A
PUBLIC INTRST WRKSH	LAW 150	0.5	0.0	P
PERSUASION	LAW 165	1.0	0.0	P

	ATM	PSD	PTS	GPA
TERM TOTAL	18.5	18.5	66.8	3.929

LAW TOTALS

	ATM	PSD	PTS	GPA
PASS/UNSATISFACTORY TOTAL	3.0	3.0	N/A	N/A
GRADED TOTAL	29.0	29.0	N/A	N/A
CUMULATIVE TOTAL	32.0	32.0	111.2	3.834

TOTAL COMPLETED UNITS 32.0

MEMORANDUM
WITHDREW 07/16/2022

END OF RECORD
NO ENTRIES BELOW THIS LINE

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VERSION 05/2021 | BTCH0055

DATE PRODUCED: MAY 31, 2023

UCLA SCHOOL OF LAW TRANSCRIPT LEGEND

UCLA School of Law
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Box 951476
Los Angeles, CA 90095-1476

(310) 825 – 2025
records@law.ucla.edu
http://www.law.ucla.edu

The following information is offered to assist in the evaluation of this student's academic record.

COURSE NUMBERS: (as of 2010) First year and MLS courses are numbered 100-199, advanced courses 200-499, seminars 500-699, experiential courses 700-799, externships 800-899, short courses 900-999. (1978-2010) First year courses are numbered 100-199, advanced courses 200-399, clinical courses 400-449, externships 450 – 499, and seminars 500 – 599.

CREDITS: Beginning 1978, credits are semester units, prior to that time, credits were quarter units.

EXPLANATION OF CODES FOUND TO THE RIGHT OF A COURSE ON OLDER TRANSCRIPTS

CODE	EXPLANATION
PU	Courses graded on a pass/Unsatisfactory/ No Credit basis
T1	First term of a multiple term course
2T	Final term of a multiple term course, unit total for all terms combined
TU	Final term of a multiple course graded on a Pass/Unsatisfactory/No Credit basis
UT	Final term of a multiple course graded on a Pass/Unsatisfactory/No Credit basis, unit total for all terms combined.

GRADE POINT AVERAGE (GPA) CALCULATION: The GPA is calculated by dividing grade points by graded units attempted. Transfer credits are not included in the UCLA GPA.

RANK: Until 1970, the School of Law ranked its graduates according to their final, cumulative grade point averages. Since that time, it has been the policy of the School of Law not to rank its student body. The only exceptions are:

- 1971 – 2015 - at the end of each academic year the top 10 students in the second- and third-year classes were ranked.
- 2016 – Present - at the end of each academic year the top 12 students in each class are ranked.
- 2009 – Present - the top ten percent of each LLM graduating class are ranked (by percentile, rather than numerically).
- The top ten percent of each JD graduating class is invited to join the Order of the Coif (a National Honorary Scholastic Society.)

HONORS:
2008 - Present - Masin Scholars – top 12 students at the end of the first year, prior to optional grade changes.
2013 – Present - Masin Gold Award (formerly Dean's Awards) – highest grade in each course graded on a curve. Masin Silver Award (formerly Runner-up Dean's Award) - second highest grade in each large course (40 or more students) graded on a curve.

ACCREDITATION: American Bar Association, 1952

CERTIFICATION: The Seal of the University of California, Los Angeles, Registrar's Office and the Registrar's signature.

FERPA NOTICE: This educational record is subject to the Federal Family Educational Rights and Privacy Act (FERPA) of 1974, and subsequent amendments. This educational record is furnished for official use only and may not be released to, or accessed by, outside agencies or third parties without the written consent of the student identified by this record.

EXPLANATION OF GRADING SYSTEM
1995 – Present

Grade & Grade Points	JD, LLM and SJD Student Definitions	MLS Student Definitions
A+ = 4.3	Extraordinary performance	Extraordinary performance
A = 4.0 A- = 3.7	Excellent performance	Superior Achievement
B+ = 3.3 B = 3.0 B- = 2.7	Good performance	Satisfactorily demonstrated potentiality for professional achievement in field of study
C+ = 2.3 C = 2.0 C- = 1.7	Satisfactory performance	Passed the course but did not do work indicative of potentiality for professional achievement in field of study
D+ = 1.3 D = 1.0	Unsatisfactory performance	Grade unavailable for MLS students
F	Lack of understanding of major aspects of the course No credit awarded	Fail
P	Pass (equivalent of C- and above) Not calculated into the GPA	Satisfactory (achievement at grade B level or better)
U	Unsatisfactory (equivalent to grades D+ and D)	Grade unavailable for MLS students
NC	No credit (equivalent to a grade of F) No unit credit awarded	No credit (equivalent to a grade of F) No unit credit awarded
LI	Incomplete, course work still in progress	Grade unavailable for MLS students
I	Grade unavailable for JD, LLM and SJD students	Incomplete, course work still in progress
IP	In Progress, multiple term course, grade given upon completion	In Progress, multiple term course, grade given upon completion
W	Withdrew from course	Withdrew from course
DR	Deferred Report	Deferred Report

Previous Grading Scales

GRADE	DEFINITION
100-85	A or excellent performance (grades of 95 and above demonstrate extraordinary performance)
84-75	B or good performance
74-65	C or satisfactory performance
64-55	D or unsatisfactory performance
54-50	F or lack of understanding of major aspects of the course No unit credit awarded
P	Pass (Equivalent to grades of 65 and above) Not calculated in the GPA
U = 62	Unsatisfactory (Equivalent to grades of 64-55)
NC = 50	No Credit (Equivalent to grades of 54-50) No unit credit awarded
IP	In Progress, multiple term course, grade given upon completion
W	Withdrew from course

GRADE	DEFINITION
H (high)	A or excellent performance
HP (high pass)	B or good performance
P (pass)	C or satisfactory performance
I (inadequate)	D or unsatisfactory performance
NC (no credit)	F or lack of understanding of major aspects of the course. No unit credit awarded
CR (credit)	Pass, unit credit awarded for the course
NR (in progress)	In progress, multiple term course, grade given upon completion
W	Withdrew from course

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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RECORDS OFFICE
SCHOOL OF LAW
385 CHARLES E. YOUNG DRIVE
LOS ANGELES, CA 90095-1476
PHONE: (310) 825-2025

April 27, 2023

RE: Law Grade Sheet

To whom this may concern,

This letter is to provide you with the list of courses **Erin Yonchak** has taken at UCLA School of law, with instructors and grades.

	Course		Instructor	Grade
21F	LAW 101 LEC 5	Intro Leg Analysis	Scallen, Eileen	P
21F	LAW 108A DIS 1P	Leg Rsrch & Writing	Diaz, Angel	IP
21F	LAW 120 LEC 6	Criminal Law	Dolovich, Sharon	A-
21F	LAW 130 LEC 6	Property	Banner, Stuart	A-
21F	LAW 145 LEC 6	Civil Procedure	Spillenger, Clyde	A-
21F	LAW 150 LEC 1	Public Intrst Wrksh	Wang, Karin	P
22S	LAW 100 LEC 6	Contracts	Verstein, Andrew	A-
22S	LAW 108B DIS 1P	Leg Rsrch & Writing	Diaz, Angel	A
22S	LAW 140 LEC 6	Torts	Zimmerman, Adam	A
22S	LAW 148 LEC 6	Constitut Law I	Goodman, Christine	A
22S	LAW 150 LEC 1	Public Intrst Wrksh	Wang, Karin	P
22S	LAW 165 LEC 17	Persuasion	Volokh, Eugene	P

Please contact me with any questions.

Digitally signed by
Brian R. Hansen
Date: 2023.04.27
08:58:58 -07'00'

Brian Hansen, J.D.
Assistant Dean of Academic Affairs & Registrar
UCLA School of Law
Hansen@law.ucla.edu

June 17, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Re: Letter of Recommendation for Erin Yonchak

Dear Judge Pitts:

I strongly recommend Erin Yonchak for a judicial clerkship. She is a brilliant student, a hard worker, and a gifted writer who would make an outstanding clerk.

I came to know Erin at the beginning of her 2L year when she transferred from UCLA to the University of Chicago Law School and enrolled in the Law School's Civil Rights Clinic, which I direct. Throughout her time in the Clinic, Erin has led the investigation of a claim of police torture for the Illinois Torture and Inquiry Relief Commission, a state administrative body that is empowered by statute to grant post-conviction relief to individuals who have made credible claims of Chicago police torture. I formerly served as a Commissioner there.

Erin is investigating the claim of a man who has spent more than twenty years in prison. He states that he was handcuffed to a wall in a small, hot, windowless interrogation room and denied access to his asthma medication, food, water, and use of a bathroom over the course of five days while being subjected to police interrogation and abuse. Statements that he made to police were the primary evidence that the prosecution used to secure his conviction. If the Commission finds credible evidence of torture, it will grant him a full evidentiary hearing before a trial court that can result in vacating his conviction.

Erin's responsibilities are similar to those of a judicial clerk and a legal investigator for an administrative agency. She is responsible for leading the investigation, researching legal issues, presenting her findings and recommendations to the eight-member Commission in a public hearing, fielding questions from the Commissioners akin to those in appellate oral arguments, and drafting the public written opinion for the Commission.

Erin began her work in the Clinic by organizing and indexing a voluminous trial, appellate, and post-conviction record that spanned more than twenty years. As a part of that process, she documented the procedural history of the case, drafted timelines of significant events, highlighted competing witness and party narratives, and identified issues in need of further research and investigation. After meticulously summarizing and indexing the record, she formulated her investigative and research plan. She identified relevant evidence and witnesses, issued subpoenas, and assessed the need for consulting experts. She researched whether the claims, which consisted predominantly of prolonged physical and psychological deprivations as opposed to affirmative physical abuse, could meet the legal definition of torture under the statute. She studied court and administrative decisions interpreting the statute. She consulted international law, after she discovered that the Commission had relied upon international standards when interpreting the statutory definition of torture. She assessed jurisdictional issues. She then drafted an interim memo that summarized her preliminary research, findings, and questions. In the memo, she analyzed existing evidence, weighed the factors for and against referral for an evidentiary hearing in court, and provided detailed citations to the record. She prepared the memo in a format that could later be incorporated into the formal decision of the Commission. She is on schedule to complete the investigation and present her recommendations to the Commission in her 3L year.

I have been consistently impressed by Erin's work. Her research and writing are outstanding, the quality of which compare favorably to the top quarter of the students I have taught over my 23 years at the Law School. She is supremely well-organized. She has met every deadline in the Clinic, while adapting to the rigor of the Law School as a new student, managing a full course load, and serving as the Executive Managing Editor of the Law Review. She is smart. She asks great questions and demonstrates sound judgment. And she is a pleasure to work with. She has a knack for clearing the chaff to get to the heart of the matter. She is a problem solver. In the course of investigating the case to which she was assigned, she diagnosed systemic problems with existing practices and recommended reforms to improve the quality and efficiency of the Commission's investigations.

Most of all, I have been impressed by Erin's commitment to excellence. Her preparation, the seriousness with which she approaches her work, the thoroughness of her research and investigation, Erin has internalized the highest standards of the legal profession and models all that it means to be a lawyer. Her appreciation of the stakes of our legal work is reflected in her diligence in every task—large and small. She is someone who by her nature goes the extra mile to ensure that what she produces is not simply good, but great. We teach the value of preparation. Erin embodies it. For example, before interviewing the Claimant in her case, she read numerous articles on legal interviews; she asked insightful questions about interview techniques; she prepared a detailed interview outline; she sought feedback from me, fellow students in the Clinic, and attorneys for the Commission; she conducted multiple moots; and she revised her outline accordingly. Her interview was simply outstanding not just in substance, but also in the human elements. She demonstrated appropriate respect toward the man she interviewed and sensitivity for his circumstances. She deftly probed potential inconsistencies, providing the Claimant the opportunity to explain without enabling him to evade sticky issues. Understanding that the Claimant's statements during her interview could be used in subsequent criminal proceedings and the fundamental Fifth Amendment issues in play, Erin took care not to abuse the Commission's power to ask questions about the underlying crime beyond those that were necessary to assess his claim of torture. When the time that the prison had allotted for the interview came to an end, it was clear to Erin that the Claimant had more to say that may be pertinent to her investigation. True to form, to ensure a thorough investigation, Erin successfully

Craig Futterman - futterman@uchicago.edu - 773-702-9494

advocated for the opportunity to conduct a follow-up interview. Again, showing her ability to navigate multiple demanding deadlines, she led the second interview just before taking her final law school examinations at the end of the academic year.

Erin has earned my highest recommendation to serve as a judicial clerk. She is special. She will not disappoint. I am confident that you will enjoy working with her. Please do not hesitate to call me at (773) 702-9611 if you would like to discuss her candidacy.

Sincerely,

/s/ Craig B. Futterman

The Hon. Algenon L. Marbley
United States District Court
Southern District Court of Ohio
55 Marconi Boulevard
Columbus, Ohio 43215

June 17, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I have been asked by Erin Yonchak to write a letter of recommendation for a clerkship in your chambers. I do so enthusiastically and without reservation.

Erin was an extern in my office in the Summer of 2022, and she was charged with the responsibility of performing legal research for my draft opinions and orders. She performed in an exemplary manner and of upper tier law clerk quality. Her sagacity is unmatched by her peer group.

From the outset, I was impressed by Erin's enthusiasm for the law, the tenacity with which she approached her work, and her commitment to thoroughness and excellence. Her writing skills are superb. Erin writes with clarity and purpose, a skill which will be invaluable as a law clerk. She researched complex legal issues meticulously and was committed to aiding the Court in rendering an informed judgment. She understands that brevity is the soul of lucidity and intelligibility, which is always reflected in her writings.

In my capacity as a federal judge and a teacher of trial advocacy, I have worked with a significant number of young lawyers and law students. Among that group of very talented young people, Erin is exceptional. She possesses an outstanding combination of innate curiosity, work ethic, and skill. Her very first assignment that fall required her to bring all of those traits to bear, and she continued to impress through the duration of her externship.

Erin also possesses the intangible qualities that differentiate a good law clerk from a great one: she is personable, unerringly positive, has an excellent sense of humor, and was well-liked by my law clerks, chambers staff, and her fellow externs alike. She is also the consummate team player: she always completed assignments on time or, more often, ahead of time.

In sum, I believe that Erin will be an outstanding law clerk and a wonderful addition to your chambers. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Algenon L. Marbley

The Honorable Algenon L. Marbley - algenon_marbley@ohsd.uscourts.gov - (614) 719-3260

Professor Anthony J. Casey
Deputy Dean, Donald M. Ephraim Professor of Law and Economics,
Faculty Director, The Center on Law and Finance
The University of Chicago Law School
1111 E. 60th Street
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June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to enthusiastically recommend Erin Yonchak as a candidate for a clerkship in your chambers. Erin is an exceptional student and possesses intellectual acumen and remarkable writing skills that make her one of the very top candidates for a clerkship position.

I had the pleasure of teaching Erin in my Business Organizations class, where she consistently displayed a deep understanding of complex legal issues and an outstanding ability to quickly analyze and synthesize information. Erin's intellectual curiosity and dedication to learning were evident in her active participation in class discussions. In fact, one of her inquiries in class was so novel and interesting that it has opened up a new area in my own research. I have suggested to Erin that this question could be the kernel for a joint project if she decides to pursue academics.

Erin's impressive academic abilities are also reflected in her position as the Executive Managing Editor of The Law Review. Her published works, including a forthcoming Comment on intrastate redistricting and an insightful online essay on rape exceptions to abortion bans, showcase her legal writing skills and her ability to tackle complex legal issues with clarity and precision.

Erin has demonstrated a commitment to public interest through her involvement in the Civil Rights and Police Accountability Project. Before transferring to the Law School, she also collaborated with Professor Eugene Volokh at UCLA on a significant research project involving the pseudonymity of a police officer challenging the constitutionality of the state's exculpatory evidence list.

Outside of her academic and professional pursuits, Erin's engaging personality, intelligence, and sense of humor make her a pleasure to interact with. I have enjoyed many stimulating conversations and debates with her on corporate law, social justice, and other topics. Her ability to articulate her thoughts confidently and clearly and to engage in thoughtful discourse is a testament to her intellect and her ability to connect with others.

Erin Yonchak is an exceptional candidate who possesses a rare combination of intellectual brilliance, exemplary writing abilities, and strong interpersonal skills. I recommend Erin for a clerkship with the highest possible praise.

Should you require any further information, please do not hesitate to contact me.

Very truly yours,
Anthony J. Casey

Professor David A. Strauss
Gerald Ratner Distinguished Service Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
d-strauss@uchicago.edu | 773-702-9601

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

Erin Yonchak, a rising third-year student here, is a very smart person who is ambitious in all the right ways. She has both an outstanding academic record and valuable experience outside of school, and she has a deep commitment to using the law to improve people's lives. I think she would be a terrific law clerk. I recommend her enthusiastically.

Erin came to our law school as a transfer student from UCLA. We do not admit many transfer students, and in my experience they are consistently excellent. That describes Erin as well. She was a standout in my Administrative Law class in the winter quarter in this past year. She wrote a first-rate exam: in particular, on a question that required her to sort out and analyze a series of complex issues, her answer was one of the very best in an outstanding class of sixty students, a class that included many of Erin's law review colleagues. Her answer showed a complete command of the material. She saw potential arguments that only one or two of her classmates spotted. There was not the slightest hint of confusion. And her writing was clear and to the point, with no wasted words.

But I was impressed with Erin even before I read her exam, because of what I saw in class – the answers she gave to questions I asked her in class, and, especially, the questions she asked me, in class and outside of class, throughout the quarter. She was consistently ahead of the game. Instead of waiting, passively, to be told what she should learn, she engaged with the material with a determination to understand it completely and to get the most out of it. When she identified tensions or inconsistencies in the cases, or places where the law did not quite make sense to her, she did not wait to have the issues explained to her; she tried to figure things out. Only then did she approach me to ask if she'd gotten it right, which she invariably had. She did this several times, and each time she had identified a genuine issue – there was never any lack of comprehension on her part – and worked her way through it. Erin showed those qualities of curiosity and intellectual ambition repeatedly.

The specific examples I remember were questions she asked me about the extent to which the formality of agency procedures determines how much deference courts will give to the agency's interpretation of a statute; the relationship between the Chevron doctrine and arbitrary and capricious review; and what it means to say that an agency rule has the force of law. One reason that I am confident that Erin will be an excellent law clerk is that she did not gloss over complexities or settle for a superficial understanding. She identified what was puzzling her and did not rest until she had satisfied herself that she fully understood the issues. Her decision to transfer from an excellent law school to one where she thought she might be challenged even more reflects, on a larger scale, the same characteristics: a willingness to embrace challenges and a determination to hold herself to high standards.

Erin worked for five years between college and law school for a political consulting firm. She wants to make the world a better place, and that experience gave her a sense of both the possibilities and the limits of what she might be able to achieve. Her combination of attributes –first-rate ability; a relentless eagerness to learn; genuine curiosity and interest in the law for its own sake, as well as for what she can accomplish with it; a determination to use her career to advance objectives she believes in; and a balanced understanding of the opportunities she will have – sets her apart. I think she will be an outstanding law clerk, and I recommend her very highly.

Sincerely,

David A. Strauss
Gerald Ratner Distinguished Service Professor of Law

ERIN YONCHAK
(513) 205-9805 | yonchak@uchicago.edu

Writing Sample

The attached writing sample is an excerpt from an early draft of my Comment that is being published in the *University of Chicago Law Review*. This sample is pulled from an initial draft prior to receiving feedback or editing assistance. I performed all the research myself, and this work is entirely my own.

Erin Yonchak

When State Policies Conflict: Parsing What a Federal Court Owes Deference in Remedying an Intrastate Redistricting Stalemate

INTRODUCTION

There is perhaps no greater federal judicial headache than remediating a state's redistricting failure. A federal court is forced to perform the "unwelcome obligation"[1] of imposing court-ordered electoral maps when a state's maps fail to meet federal requirements. Often, this remediation occurs after a federal court has struck down a state's redistricted maps on federal constitutional or statutory grounds. Other times, a federal court must impose "a court-ordered plan . . . because partisan politics frustrate the efforts of a state legislature to enact a new plan after a recent census."[2] In the latter scenario, the federal court has the unenviable task of breaking an intrastate stalemate in a high-stakes, hyperpartisan dispute and attempting to reconcile or select amongst state policies that are in direct conflict.[3] The manner in which a federal court goes about doing so can "change the identity, allegiance, and political priorities of . . . the [state legislature] as a whole."[4] This Comment will analyze the federal court's unique remedial role in these intrastate stalemate-derived redistricting cases, proposing a novel distinction between intrastate stalemate cases and other redistricting cases.

The United States Supreme Court has made clear that federal courts must defer to state policies and state plans in crafting or selecting remedial maps.[5] But what is a state policy or plan that is owed deference? This is a particularly thorny question in intrastate redistricting stalemate cases which are fueled by partisan gridlock. By the very nature of the intrastate conflict, state policies are dissonant. For example, a divided state legislature may be unable to reach consensus on new maps that endanger their own members' seats and set the legislative power balance for years to come.[6] Or a split-party state executive and legislative branch may fall into an endless cycle of map-drawing rejected by veto.[7] Or a strongly united partisan state legislative and executive branch may act heedless to state constitutional controls, resulting in state courts repeatedly striking down reapportioned maps as unconstitutional.[8]

As such, in the remedial phase of an intrastate stalemate, a federal

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[1] Connor v. Finch, 431 U.S. 407, 415 (1977).

[2] Karcher v. Daggett, 462 U.S. 725, 734 n.6 (1983).

[3] *See, e.g.*, Colleton Cnty. Council v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002); Essex v. Kobach, 874 F. Supp. 2d 1069 (D. Kan. 2012); Gonidakis v. LaRose, No. 2:22-CV-0773, 2022 WL 1175617 (S.D. Ohio Apr. 20, 2022).

[4] Justin Levitt, *Why Should We Care?*, ALL ABOUT REDISTRICTING, https://perma.cc/UTW6-CY5A.

[5] *Infra* Section III.

[6] *Infra* Section IV(A).

[7] *Infra* Section IV(B).

[8] *Infra* Section IV(C).

court may juggle several competing proposed maps or redistricting policies from each branch of the state government. How should a court treat a map approved by the legislature but vetoed by the governor? Does the mapmaking body's rejected plan get special deference even though it failed to clear state constitutional checks-and-balances?

The stakes to this answer are incredibly high. All efforts to reform partisan gerrymandering must come from the states and be enforced by state courts, because the United States Supreme Court has found it to be a nonjusticiable political matter.[9] So what a federal court chooses to recognize as a state policy or plan that is owed deference, if done thoughtlessly, not only amounts to picking a winner in the bitter hyperpartisan dispute, but also has the potential to gut redistricting reform efforts. Therefore, it is important for a court to thoughtfully consider what qualifies as a state plan or policy owed deference in an intrastate conflict.

In this Comment, I will map each of the common intrastate conflict scenarios and synthesize federal precedent in an attempt to draw the most faithful interpretation of what, if any, state electoral plans or policies are owed deference in those conflicts. I will conclude that no recently enacted state map is owed deference by a federal court in an intrastate stalemate. Instead, the state constitution, being the supreme source of state law, must be the policy owed deference over conflicting sources of state policy of plans. Recognizing the fact that some degree of state constitutional failure is unavoidable—the failure to produce redistricted maps through the legislative process required by the state constitution is itself a state constitutional violation—in a redistricting stalemate leading to federal court remediation, I propose a potential lens to differentiate between state constitutional provisions in parsing what state plans or policies are owed deference. Finally, while I limit the bulk of my analysis to state electoral maps, I develop the implications of my analysis to federal electoral maps after *Moore v. Harper*, and how it raises the stakes of this Comment.[10]

I. BACKGROUND

The organization of state elections is a power reserved to the states.[11] Unlike federal elections, which receive an explicit mention in the Federal Constitution's Elections Clause[12] and can be directly regulated by the United States Congress,[13] state elections have no federal controls beyond the

[9] Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

[10] 142 S. Ct. 2901 (U.S. June 30, 2022).

[11] *E.g.*, Growe v. Emison, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts").

[12] U.S. CONST. art I, § 4, cl. 1.

[13] *See, e.g.*, 2 U.S.C. § 2a.

increasingly limited protections afforded under the Voting Rights Act[14] (VRA) and the protections available under the Federal Constitution. These include, in the realm of state electoral redistricting, the right to vote[15] and, under the Equal Protection Clause of the Fourteenth Amendment, the right to one-person one-vote.[16] The one-person one-vote principle effectively mandates that states must reapportion after a census to account for population changes.[17] If states fail to put in place reapportioned maps, federal courts must intervene to protect the right to vote by imposing maps that meet federal constitutional one-person one-vote criteria.[18]

In practice, this works as follows. First, the Supreme Court has made clear that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."[19] But states can—and do—unilaterally fail to enact new maps because of an intrastate stalemate, as the stakes of redistricting are extraordinarily high, and divided stakeholders are primed to fall into a bitter partisan breakdown.

Federal courts must defer intervention to give a state every opportunity to draw their own electoral maps, "neither affirmatively obstruct[ing] state reapportionment nor permit[ting] federal litigation to be used to impede it."[20] So when a federal court finally intervenes, effectively as

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[14] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437. *See* Shelby Cnty., Ala. V. Holder, 570 U.S. 529 (2013) (gutting most of the VRA's § 5 preclearance protections).

[15] Reynolds v. Sims, 377 U.S. 533, 554, 561-62 (1964) (holding that "the Constitution . . . protects the right of all qualified citizens to vote, in state as well as in federal elections").

[16] *Id.* at 566-68 (holding that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators . . . [and] that the seats in both houses of a bicameral state legislature must be apportioned on a population basis"). *But see* Harris v. Arizona Indep. Redistricting Comm'n, 578 U.S. 253, 136 (2016) (holding that, for state legislative maps, population deviations of less than 10% are not a per se one-person one-vote constitutional violation).

[17] *E.g.*, *Reynolds*, 377 U.S. at 584 (noting that if state "reapportionment were accomplished with less frequency [than decennially], it would assuredly be constitutionally suspect").

[18] This intrastate stalemate scenario where there are no properly enacted maps after a census is distinct from where a state enacts legislative maps after a census that are subsequently found to be violative of Equal Protection one-person one-vote criteria, as I discuss *infra* Section III.

[19] Chapman v. Meier, 420 U.S. 1, 27 (1975).

[20] *Growe*, 507 U.S. at 34. *Growe* makes clear that federal courts must also defer to state court redistricting proceedings, but that deference is "limited [to] deferral in favor of state court remedial proceedings, and only to the extent that the state court has shown that it will adopt a plan in time for the next round of elections." *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 893 (2001). *See also* Branch v. Smith, 538 U.S. 254, 262 (2003) (holding that federal court intervention was proper as, unlike in *Growe*, "there is no suggestion that the District Court failed to allow the state court adequate opportunity to develop a redistricting plan").

a last resort, imposing a remedy is an inherently rushed process[21] conducted by a three-judge district court[22] with immediate election deadlines looming.[23]

The Supreme Court has recognized that in statewide malapportionment cases—as these post-census cases necessarily are—the only way to vindicate an individual plaintiff's right to an equally weighted vote [is] through a wholesale 'restructuring of the geographical distribution of seats in a state legislature.'"[24] Thus, a federal court's remedy in a case where a state fails to redistrict after a census is not limited solely to the plaintiff's county or district lines, but instead involves imposing statewide maps that cure for the constitutional violation.

A federal court has equitable power in selecting and imposing a redistricting remedy.[25] The remedial options available to a court include: fashioning court-drawn maps, enlisting the help of an independent mapmaker to craft a map, or selecting one of the party's proposed maps (which the court may choose to modify). But the court is not totally free to pick or draw maps at its own whim.[26] The Supreme Court has imposed clear limits and expectations on available equitable remedies.[27] Perhaps the most ambiguous rule, yet the most reiterated time and time again by the Supreme Court,[28] is that a federal court must defer to state policies and state plans in crafting or selecting the remedial maps. Failure to adequately defer to state policies and plans is reversible error.[29]

II. STATE CONSTITUTIONS AND STATE GOVERNMENT

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[21] *See, e.g.*, Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1146–47 (2005) (lamenting the "frenzied" process that accompanies court-drawn redistricting plans).

[22] Pursuant to 28 U.S.C. § 2284, a three-judge district court shall be convened for apportionment challenges.

[23] In addition to simply meeting election dates, substantial campaign and election infrastructure must be built prior to the election, and hinges on the remedy, so a court has a decidedly short window to impose its remedy before it becomes impracticable to implement.

[24] Gill v. Whitford, 138 S. Ct. 1916, 1921 (2018) (quoting *Reynolds*, 377 U.S. at 561).

[25] *Reynolds*, 377 U.S. at 585 (1964).

[26] *E.g.*, Whitcomb v. Chavis, 403 U.S. 124, 161 (1971) (holding in a legislative apportionment case that "[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited"); Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 200 (1972) (repeating the *Whitcomb* quote in another reapportionment case).

[27] *E.g.*, *Chapman*, 420 U.S. at 26–27 (holding that "a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than de minimis variation").

[28] *Infra* Section III.

[29] *E.g.*, White v. Weiser, 412 U.S. 783, 797 (1973); *Beens*, 406 U.S. at 200.

Before parsing what constitutes a state plan or policy that is owed deference when an intrastate conflict arises, one must first understand the role of the state constitution in the organization of a state. State constitutions—the supreme law of the state—originate the bodies of state government, delegate the lawmaking power and process, including the power to redistrict, and place substantive controls on such lawmaking power. And any act of a state government repugnant to its state constitution is void—reapportionment plans are no exception.

Much like the federal government, state governments are organized by—and creatures of—their state constitutions. The origins of this understanding date back to America's founding.[30] State constitutions preceded the Federal Constitution by more than a decade and provided the building blocks used by the framers for the Federal Constitution.[31] One such building block was the understanding of the role of a constitution as the supreme law of the state, a fundamental product of the American Revolution.[32] The supremacy of state constitutions in state law was readily apparent to the founding generation.[33]

Early state constitutions made clear that all power comes from the people, establishing that the "fundamental constituent power of the people [is] needed to legitimate the ground rules for legislation in the form of a written constitution."[34] Thus, a state constitution's supremacy in state law is derived from its manifestation as the explicit grant of the people's power to the state government, and a constitution's constraints, rights, and rules are what that grant of power is conditioned upon.[35]

So, while states have plenary powers rather than enumerated powers under the Federal Constitution, state constitutions both originate the structure and bodies of a states' government and can place "significant

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[30] Gordon S. Wood, *Foreword, State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993)

[31] *Id.*

[32] *Id.*

[33] *See e.g.*, *id.* (quoting Thomas Paine, Rights of Man (1791), in 1 THE COMPLETE WRITINGS OF THOMAS PAINE 278–79 (Philip S. Forner ed., 1945)) ("A constitution was a written document distinct from, and superior to, all the operations of government . . . [and] is to a government what the laws made afterwards by that government are to a court of judicature. The court of judicature . . . acts in conformity to the laws made: and the government is in like manner governed by the constitution.").

[34] WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS : REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 297, 133–34. (2001).

[35] The people's power as an expression of the state constitution holds true today in the modern state constitutional amendment process, where each state's constitution requires constitutional amendments to be ratified by popular vote. Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65 (2019).

substantive and procedural limits" on those bodies' plenary powers.[36] Early state jurisprudence reinforces this understanding. Over a decade before *Marbury v. Madison*[37] famously established on the federal level that "[a]n act of congress repugnant to the constitution cannot become a law,"[38] state courts had already determined such on the state level.[39] Put about as clearly as possible by one early state opinion parsing a state constitution:

> The Constitution is . . . the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it . . . The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move . . . [T]here can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.[40]

In the realm of state redistricting, this means that the state constitution is the source that assigns which body has the power to draw maps, the process through which those maps must be approved, and the substantive qualities that the map-drawing body must incorporate into those maps. And since every act of the state government repugnant to the state constitution is absolutely void, a state redistricting plan or policy repugnant to the state constitution must necessarily be void, as, beyond the VRA and the Federal Constitution's safeguards, there is no higher power than the state constitution for defining requirements in state electoral maps.[41]

While all states are organized similarly to the federal government, "sharing both the familiar tripartite allocation of powers among functionally differentiated legislative, executive, and judicial branches [with] some degree of interbranch 'checks and balances,' . . . there are enough structural differences between the Federal Constitution and state constitutions to make

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[36] Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 102 (1998). *See also* Giozza v. Tiernan, 148 U.S. 657, 661 (1893) ("there are no limitations upon the legislative power of the legislature of a state, except those imposed by its written constitution."); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. CT. REV. 1, 20–21 ("[S]tate constitutions are masters of state legislatures . . . Since the Revolution, every state legislature has been defined and circumscribed, both procedurally (e.g., What counts as a quorum? Is the governor involved in legislation?) and substantively (e.g., What rights must the legislature respect?) by its state constitution, which in turn emanates from the people of each state. When a state legislature violates the procedural or substantive state constitutional limitations upon it, it is no longer operating as a true state legislature for these purposes . . . When Congress enacts an unconstitutional bill, its actions simply cease to have the force of law. The same first principles hold true when a state legislature enacts a bill violative of its state constitution").

[37] 5 U.S. 137 (1803).

[38] *Id.* at 138.

[39] *E.g.*, CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 46–47 (1914).

[40] VanHorne's Lessee v. Dorrance, 2 Dall. 304, 308 (C.C.D. Pa. 1795).

[41] *Supra* Section II. *But see infra* Section VI for congressional electoral maps.

[ ] reliance on federal distribution of governmental power precedents suspect."[42] Most often, state constitutions delegate state electoral redistricting to their state legislature.[43] Typical legislative checks and balances apply to state electoral maps, usually including a gubernatorial veto.[44] In other states, constitutions delegate state electoral redistricting to redistricting commissions, which vary state by state in their degree of independence from elected officials.[45] Legislatures in some states are able to override these commission-drawn maps in specific scenarios.[46] Several states provide for backup commissions in the event of legislative failure.[47] State courts generally have original jurisdiction over actions concerning state redistricting, and can hear constitutional challenges to state legislative maps like any other state legislation.[48]

Beyond delegating and setting out the state electoral redistricting process, many state constitutions provide rules that regulate the substance of the maps and must be incorporated by the mapmakers. For example, some state constitutions prescribe the number of legislative districts that each redistricting plan must include.[49] Thirty nine state constitutions require at least one chamber's state legislative districts to be contiguous.[50] Twenty eight state constitutions require state legislative districts to show some accounting for political boundaries, such as county, city, town, or ward lines, when drawing districts.[51] Twenty eight state constitutions require their state legislative districts to be reasonably compact.[52] Thirteen states constitutions require that state assembly districts be nested within state senate districts.[53] Twelve state constitutions regulate partisan outcomes in the redistricting process for state legislative maps.[54] Eight state constitutions consider keeping "communities of interest" whole when drawing state legislative districts.[55]

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[42] John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1221 (1993).

[43] Thirty-four state legislatures have primary control of their own district lines. *E.g.*, Justin Levitt, *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, https://perma.cc/JE8D-LWRH.

[44] *Id.*

[45] *Id.*

[46] I*d.*

[47] *Id.*

[48] *E.g.*, ILL. CONST., art. 6, § 9.

[49] *E.g.*, PA. CONST, art. 2, § 16; TEX. CONST., art. III.

[50] *E.g.*, Justin Levitt, *Where Are the Lines Drawn?*, ALL ABOUT REDISTRICTING, https://perma.cc/KGB6-Q69K.; Justin Levitt, *Criteria for State Legislative Districts*, ALL ABOUT REDISTRICTING, https://perma.cc/PCU8-LRJE.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

III. SUPREME COURT GUIDANCE REGARDING DEFERENCE TO STATE POLICY

In crafting a redistricting remedy, the Supreme Court has distilled a general theme to guide federal courts: deference to the state. But the collective body of guidance of what that means is less than clear, and at times contradictory. In this Section, I examine the Supreme Court precedent outlining this standard that continues to be used by lower courts in shaping redistricting remedies today. I argue that read together, these cases agree that the controlling state policies owed deference are: (1) the state constitution, and (2) validly enacted state statutes.

A. Foundational Cases

In the 1960s, after the Supreme Court first declared redistricting cases justiciable and established that the Equal Protection Clause includes the one-person, one-vote principle,[56] an onslaught of cases followed. Within nine months, litigants challenged nearly three-fourths of states' legislative apportionment schemes.[57] Many of these early cases, while foundational and still controlling law today, are procedurally distinct from later Equal Protection one-person, one-vote cases arising from post-census intrastate redistricting stalemates. In these early cases, there is no intrastate conflicts at issue but rather states' existing electoral maps simply did not meet the newly established one-person, one-vote standard. And, since the Court was still actively defining the one-person, one-vote standard, states in these early years routinely enacted maps that failed to meet the evolving standard.[58] Below, I pull out a couple of the most foundational cases in this vein that shape the state policy deference standard today. But neither of these cases adequately clarifies what should be considered controlling state policy in an intrastate conflict scenario, because, in each instance, there was not a true intrastate conflict but only a conflict between existing properly enacted state maps and the federal constitution.

1. *Reynolds v. Sims.*

The first United States Supreme Court case to evaluate a federal court redistricting remedy, *Reynolds v. Sims*,[59] came just two years after the Supreme Court first declared redistricting cases justiciable.[60] The district

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[56] *See* Baker v. Carr, 369 U.S. 186, 209–10 (1962).

[57] Reynolds v. Sims, 377 U.S. 533, 556 n.30 (1964).

[58] *See, e.g.*, White v. Weiser, 412 U.S. 783, 790 (1973) (holding that even though the percentage of population deviations in the state's electoral map were less than five percent, substantially smaller than those invalidated in past cases, the deviations "were not 'unavoidable,' and . . . not as mathematically equal as reasonably possible.").

[59] 377 U.S. 533 (1964).

[60] *Baker*, 369 U.S. at 209–10.

court found Alabama's state electoral maps an Equal Protection violation, as the maps had not been redrawn in sixty years and were significantly malapportioned.[61] The district court gave the state a cure period, during which the state devised two revised plans for maps.[62] The district court found both of these plans violative of the Equal Protection clause, and imposed its own maps by combining the better features of the two revised plans.[63] In shaping this remedy, the district court explicitly grappled with Alabama's constitutional apportionment requirements noting that: "Certainly an earnest effort must be made to meet all such [state constitutional] requirements, and it is only in the event that proves impossible that the Supremacy Clause of the Federal Constitution would cause any irreconcilable and conflicting requirement of the State Constitution to give way."[64] The Supreme Court affirmed the district court's remedial action as "proper," and affirmed that "[c]learly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."[65]

As noted above, Alabama enacted two plans[66] during the cure period, thus this case is distinct from an instrastate stalemate case—where no plan is in place at all. Noticeably absent from discussion was the explicit references to deference to state policies and plans that come in later opinions. Since there was not an intrastate stalemate resulting in no legislatively enacted plans, so there was little to quarrel about what constituted present state policy (the two state-enacted cure period plans). The lower court grafted those two legislatively enacted plans together in shaping its remedy, differing from some of the specific Alabama constitutional requirements only after determining that they could not possibly be met while protecting Equal Protection one-person, one-vote requirements.

2. *White v. Weiser*.

A couple years after the Supreme Court first hinted at the state policy deference standard,[67] it expounded and solidified the requirement in *White v. Weiser*[68]—making clear that federal courts must observe deference to state policy when remediating both state electoral maps and federal electoral maps. In *White*, the Supreme Court agreed with the three-judge-federal district

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[61] *Reynolds*, 377 U.S. at 545.

[62] *Id.* at 543–44.

[63] *Id.* at 552.

[64] Sims v. Frink, 208 F. Supp. 431, 439 (M.D. Ala. 1962), *aff'd sub nom.* Reynolds v. Sims, 377 U.S. 533 (1964).

[65] *Reynolds*, 377 U.S. at 584, 586.

[66] One of these two plans was a legislatively enacted constitutional amendment "to be proposed to the voters for ratification." Reynolds v. Sims, 377 U.S. 533, 543 (1964). The opinion did not turn heavily on this plan or discuss if, at this pre-ratification stage, it was owed legislative deference.

[67] Whitcomb v. Chavis, 403 U.S. 124, 160 (1971) (holding that a federal court "should not intrude more than necessary" to cure the federal constitutional violation when crafting a state electoral redistricting remedy.

[68] 412 U.S. 783 (1973).

court's finding that Texas's enacted post-1970-census bill redistricting its congressional electoral map violated the Equal Protection one-person, one-vote principle.[69] But the Supreme Court reversed on the grounds that the lower court had not adequately deferred to state policy in imposing its remedy.[70] The lower court, when choosing between two remedial maps presented by the parties, had selected the map that "substantially disregarded the configuration of the districts" in the enacted—but federally unconstitutional—Texas bill.[71] The Supreme Court announced that:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor "intrude upon state policy any more than necessary."[72]

Thus, the Supreme Court held that the lower court should have instead selected the map that "generally followed the redistricting pattern of [the Texas bill] . . . [but] adjusted where necessary so as to achieve smaller population variances among districts."[73] Fundamental to the Supreme Court's analysis was that Texas's existing electoral maps were owed deference as state policy because they were "a duly enacted statute of the State of Texas."[74] Thus, while *White v. Weiser* announces a standard that binds courts today, its holding and reasoning is inapposite to an intrastate redistricting stalemate Equal Protection case, because *White v. Weiser* contained a clear pronouncement of state policy in the form of a properly enacted map.

B. Intrastate Conflict Cases

The Supreme Court has twice meaningfully reviewed a federal court's imposed remedy in an Equal Protection one-person, one-vote case that resulted from a pure post-census intrastate redistricting stalemate. Below I outline those two cases in depth as they are the most informative of what qualifies as a state policy that is owed deference, and how to make that determination in an intrastate conflict scenario.

1. Sixty-Seventh Minnesota State Senate v. Beens.

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[69] *Id.* at 784–85, 792–93. There is no question that the maps were properly enacted as the Court even notes that "the Governor of the State of Texas signed [the redistricting bill] into law." *Id.*

[70] *Id.* at 797.

[71] *Id.* at 787, 794.

[72] *Id.* at 795 (quoting *Whitcomb*, 403 U.S. at 160).

[73] *Id.* at 786, 796–77.

[74] *White*, 412 U.S. at 795.

In *Sixty-Seventh Minnesota State Senate v. Beens*,[75] the Minnesota legislature failed to reapportion after the 1970 census, as their plan was rejected by gubernatorial veto.[76] The three-judge federal court attempted to reconcile conflicting state policies by crafting remedial maps that slashed the state senate's size almost in half and the state house's size by nearly one-fourth.[77] The United States Supreme Court reversed the three-judge court's imposed remedial plan because it "so drastically chang[ed] the number of legislative districts and the size of the respective houses of the Minnesota Legislature [in a way] not required by the Federal Constitution and is not justified as an exercise of federal judicial power."[78] The Court reached this conclusion by first looking to the Minnesota Constitution, because "courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."[79] The Court reasoned that, because the Minnesota Constitution vests the legislature with the power to reapportion, it follows "that a federal reapportionment court should accommodate the relief ordered to the appropriate provisions of state statutes relating to the legislature's size."[80] The Court noted that the specific number of legislative districts has been in effect in Minnesota since 1913, lasting through two succeeding reapportionments and restated six years ago in a valid statute "determined by the legislature and approved by the Governor of the State."[81] For good measure, the Court notes that judicial reapportionment effectuated changes in a state legislature's size can be justified by state constitutional demand.[82]

The dissent on the other hand remarked that the three-judge court "perceived conflict among legitimate state policies."[83]

> [The lower court] clearly recognized that the size of the houses of the Minnesota Legislature set by state statute was a state policy deserving respect. But it also recognized that there were several other legitimate state policies at stake—for one, the conformance of legislative district boundaries to political jurisdictional boundaries.[84]

Thus, what can be understood from the majority opinion of *Beens* is that, where state policies conflict, the starting point is the state constitution. And where that state constitution grants reapportionment power to the legislature, properly enacted state statutes are policies that are afforded higher deference than other non-statutory and non-state constitutional sources of policies.

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[75] 406 U.S. 187 (1972).

[76] *Id.* at 189–90.

[77] *Id.* at 199.

[78] *Id.* at 198.

[79] *Id.* at 196 (quoting *Reynolds*, 377 U.S., at 584).

[80] *Id.* at 196–97.

[81] *Beens*, 406 U.S at 197. The Court noted that though these numbers were housed in the old apportionment act that contained the old maps, it should have been severed by the district court and not unnecessarily nullified. *Id.* at 198.

[82] *Id.* at 198–99, 198 n.10.

[83] *Id.* at 202 (Stewart, J., dissenting).

[84] *Id.* at 202–03 (Stewart, J. dissenting).

2. Chapman v. Meier.

In *Chapman v. Meier*,[85] after the 1970 census, the North Dakota state legislature passed a state legislative reapportionment plan.[86] The plan was defeated by a referendum vote as it was subject to under the North Dakota state constitution.[87] The United States Supreme Court noted that "[t]he Legislative Assembly's work to reapportion was thus nullified by the people."[88] The Supreme Court reviewed the lower court's remedially imposed state legislative maps which included multimember state senate districts.[89] Looking to the "North Dakota constitutional and statutory provisions," the Supreme Court found no evidence that multimember state senate districts were a "policy" of the state beyond (1) previous federal court-ordered remedial redistricting plans, which were plainly not sources of state policy, and (2) the reapportionment plan nullified by referendum.[90] The Court held that "the Legislative Assembly['s reapportionment plan that] provided for multimember senate representation . . . was promptly aborted [by referendum] . . . [And], therefore, obviously does not qualify as established state policy."[91] Thus, the Court remanded to the three-judge district court to redraw the remedial map, eliminating the multimember state senate districts.[92]

The Court's analysis in *Chapman* makes clear that a legitimate redistricting policy owed deference in an intrastate conflict is one that is expressed in the state constitution or a properly enacted statute. And when a statute fails a constitutional check like a referendum, it is not owed deference. Perhaps tellingly, in parsing what was considered "state policy" in this intrastate redistricting conflict, the Supreme Court immediately began its opinion by laying out the relevant North Dakota state constitutional provisions.[93]

C. Cases Resulting from a VRA-Created Stalemate

There is another line of Equal Protection one-person, one-vote cases that derive from state reapportionment failure under the Voting Rights Act.[94] In this line of cases, a state reapportionment plan has been submitted by the state for VRA preclearance, and has either failed VRA preclearance or has not received timely VRA preclearance, leaving the state without

[85] 420 U.S. 1 (1975).
[86] *Id.* at 12.
[87] *Id.* at 3, 12.
[88] *Id.* at 12.
[89] *Id.* at 13.
[90] *Id.* at 14–15.
[91] *Chapman*, 420 U.S. at 15.
[92] *Id.* at 21.
[93] *Id.* at 3–4.
[94] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

reapportioned maps for an upcoming election.[95] These VRA-derived Equal Protection cases are sufficiently procedurally distinct from an intrastate stalemate Equal Protection case that the remedial guidance laid out in VRA cases is not squarely pertinent to an intrastate conflict scenario.

What perhaps can be deceptive about the VRA Equal Protection cases is that, on first glance, they appear to be a stalemate. But the nature of the stalemate is fundamentally different from an intrastate stalemate. The VRA requires that plans submitted for preclearance be final and enacted.[96] This contemplates that the state reapportionment plan has passed via the proper state legislative process, including the bill being signed by the Governor, before being submitted to the VRA.[97] Therefore, a plan submitted for VRA preclearance is a pronouncement of state policy owed deference. The Supreme Court recognizes this in their precedent, and it is in these cases that the Supreme Court has established some of the strongest guidance regarding the deference to state policy:

> To avoid being compelled to make such otherwise standardless decisions [in selecting and imposing a redistricting remedy post-census], a district court should take guidance from the State's recently enacted plan in drafting an interim plan. That plan reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth. This Court has observed before that "faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying" a state plan—even one that was itself unenforceable—"to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."[98]

Thus, the Court makes clear that an important starting place for any court imposing a redistricting remedy is looking to a state's "recently enacted plan." In the VRA-derived Equal Protection cases, this recently enacted plan is clear as it was properly enacted by the state to be submitted for VRA preclearance. But, as I will discuss *infra* Section III, there is inherently not a "recently enacted plan" in an intrastate conflict.

III. When State Policies Conflict: What is Owed Deference?

When a federal court must intervene to put state electoral maps in place to protect the right to vote, an instrastate conflict has derailed the mapmaking process.[99] Much like with federal government's checks-and-

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[95] *See, e.g.*, Upham v. Seamon, 456 U.S. 37 (1982); Perry v. Perez, 565 U.S. 388 (2012); Connor v. Finch, 431 U.S. 407 (1977); Abrams v. Johnson, 521 U.S. 74 (1997).

[96] 28 CFR 51.22(a)(1).

[97] But it can be heard prior to referendum or other judicial review by state courts. 28 CFR 51.22(a)(b).

[98] *Perry*, 565 U.S. at 393 (citations omitted) (quoting *Abrams*, 521 U.S. at 79 and *Upham*, 456 U.S. at 40).

[99] VRA preclearance is the exception. *Supra* Section III(C).

balances, state government conflicts usually occur as follows: (1) an intralegislative conflict, due to one or both legislative branches[100] being unable to agree on a map or garner sufficient votes to pass a map; (2) a conflict between the state's legislative branch and the executive branch via the governor vetoing a legislatively passed map; and (3) a conflict between the state court and the mapmaking body.

The Supreme Court has pronounced that a federal court "should take guidance from the State's recently enacted plan in drafting an interim plan [as] [t]hat plan reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to [post-census] population growth."[101] But is there ever a "recently enacted plan" that is owed deference in an intrastate stalemate Equal Protection case? This Section explores each intrastate conflict scenario, and what, if any, state plans are owed deference.

A. Maps That Never Make It to Legislative Adoption

Perhaps it seems obvious that a reapportionment plan that dies in either branch of a state legislature, never making it to legislative adoption, is not a "recently enacted plan" or pronouncement of state policy owed deference. The Supreme Court, speaking on a separate statutory issue, seemed to hint such a conclusion would indeed be obvious: "*Of course* the State has not been redistricted if districts have been drawn by someone without authority to redistrict. Should an ambitious county clerk or individual legislator sit down and draw up a districting map, no one would think that the State has . . . been 'redistricted.'"[102] Lower courts agree that any plan that does not make it through the proper legislative process to legislative adoption is not owed deference as state policy.[103] This is particularly intuitive because "the failure of a bill to be enacted evidences a legislative policy that the bill is not desired by the legislature."[104] Likewise, a reapportionment plan devised by a state body that does not have the authority vested in it to reapportion is not owed deference.[105] To give deference to such a

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[100] I use legislative branch here for brevity and because most states vest redistricting power in their legislative branch. But this term is used interchangeably with "mapmaking body" which includes whatever body a state vests its electoral mapmaking power in.

[101] Perry v. Perez, 565 U.S. 388, 393 (2012).

[102] Branch v. Smith, 538 U.S. 254, 277–78 (2003) (discussing meaning of "redistricted" in meaning of 2 U.S.C. § 2a(c)).

[103] *See, e.g.*, Shayer v. Kirkpatrick, 541 F.Supp. 922, 929 (W.D.Mo.), *aff'd*, 456 U.S. 966, 102 (1982) (plan not adopted by state legislature "can hardly be said to demonstrate any legislative intent other than a rejection of the plan"); Essex v. Kobach, 874 F. Supp. 2d 1069, 1084 (D. Kan. 2012) ("we owe no deference to any proposed plan, as none has successfully navigated the legislative process to the point of enactment").

[104] *Shayer*, 541 F. Supp. at 932.

[105] Bodker v. Taylor, No. CIV.A.1:02-CV-999ODE, 2002 WL 32587312 (N.D. Ga. June 5, 2002) (refusing to defer to county board reapportionment plan where

reapportionment plan or simply the reapportionment bill that made it the furthest in the legislative process "would be a massive intrusion into the legislative process. [A federal court] would, in effect, be amending the [state constitutional] rules for enacting legislation."[106]

B. Vetoed Maps

It is relatively settled that a vetoed reapportionment plan is also not a "recently enacted plan" and does not deserve deference as a valid state policy. The Supreme Court has spoken on this exact scenario in *Beens*, where the Court held that a state legislative map that had been vetoed was only a "proffered current policy," on equal footing with the executive's proposed maps.[107] A legislative plan is "nullified by the Governor's veto,"[108] and the deference afforded to it is likewise nullified. In determining such, the U.S. Supreme Court cited to a Minnesota Supreme Court opinion holding that "a qualified veto was put in the [Minnesota] [C]onstitution as a check upon the power of the legislature to redistrict and apportion."[109] On remand from the Court's opinion, the three-judge court proceeded to redraw the maps in accordance with the district numbers as prescribed by statute, without so much as a reference to the vetoed map.[110]

Lower courts, across several states, appear nearly unanimous in agreement with the reasoning in *Beens*.[111] Often, these courts put particular emphasis on the fact that a governor's approval is required for a plan to become law, and a plan that has not gone through the process to become law is not owed deference.[112] This reasoning largely tracks unchallenged U.S.

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the board had no power to reapportion under the state constitution because "[f]or the court to defer to a redistricting plan proposed by the Fulton County Board of Commissioners, one that has not been considered by the General Assembly [which was vested reapportionment power under the state constitution], would give to Fulton County that which the state of Georgia intended to retain, and in so doing would raise serious federalism concerns.").

[106] *Shayer*, 541 F. Supp. at 932.

[107] *Beens*, 406 U.S. at 197.

[108] *Id.* at 195.

[109] Duxbury v. Donovan, 272 Minn. 424, 442 (1965).

[110] Beens v. Erdahl, 349 F. Supp. 97 (D. Minn. 1972).

[111] Carstens v. Lamm, 543 F. Supp. 68, 79 (D. Colo. 1982); O'Sullivan v. Brier, 540 F. Supp. 1200, 1202 (D. Kan. 1982); Colleton Cnty. Council v. McConnell, 201 F. Supp. 2d 618, 623 (D.S.C. 2002), opinion clarified (Apr. 18, 2002). *But see* Donnelly v. Meskill, 345 F. Supp. 962, 965 (D. Conn. 1972) (basically adopting a vetoed legislative plan with minor changes to cure equal representation issues because: "The legislative adoption of [the plan] scales in favor of the plan [it]." Given that this case only tended to federal congressional maps, perhaps the *Donnelly* court was implicitly considering the Election Clause in giving special weight to the legislature over the executive in this way. This case was also distinguished by *Carstens* court on the basis that the *Donnelly* court faced "severe time constraints." *Carstens*, 543 F. Supp. at 78).

[112] *E.g.*, *O'Sullivan*, 540 F. Supp. at 1202 ("we are not required to defer to any plan that has not survived the full legislative process to become law").

Supreme Court precedent finding that a gubernatorial veto is not preempted by the Elections Clause for federal electoral maps because it is a part of the lawmaking process under the state constitution.[113]

One particularly astute federal court, in declining to afford deference to a vetoed legislative plan, remarked that the opposite result would mean "a partisan state legislature could simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the Court defer to their proposal."[114] This is precisely the danger of a federal court determining a vetoed map is owed deference: it effectively overrides the gubernatorial veto, eliminating a vital state constitutional check on the state legislature's power, and, thereby, creating an outcome in bitter intrastate partisan dispute that could not occur under the state constitution.

C. Maps Invalidated by the State Supreme Court as Unconstitutional

A stalemate between the state judiciary and the state mapmaking body is a rare fact pattern in Equal Protection one-person, one-vote cases because usually state courts have the remedial power to impose their own maps to cure for state constitutional violations. But recent amendments in two states' constitutions, Ohio and Michigan, expressly bar state courts from imposing remedial electoral maps.[115] If those state judiciaries repeatedly reject the states' reapportioned maps as unconstitutional, the states can end up mapless approaching an impending election. In the very first instance that Ohio underwent redistricting following its state constitutional amendment, this very stalemate occurred and a federal court was forced to intervene and

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[113] Smiley v. Holm, 285 U.S. 355 (1932) (nothing that "nothing in article 1, s 4, which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."); Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 808 (2015) (affirming that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."). *Moore*, 142 S. Ct. *argued* Dec. 7, 2022 (parties conceding that a gubernatorial veto is a valid state constitutional check on congressional redistricting under the Elections Clause).

[114] *Carstens*, 543 F. Supp. at 79. Though this case only pertained to federal congressional maps, the deference standard is indistinguishable. *See* White v. Weiser, 412 U.S. 783, 797 (1973). Ultimately, the court concluded that both the legislature and the governor's proposed plans were merely "'proffered current policy' rather than clear expressions of state policy." *Carstens*, 543 F. Supp. at 79 (quoting *Beens*, 406 U.S. at 197).

[115] OHIO CONST. art XI, § 9; MICH. CONST. art. IV, § 6. These states both adopted this change recently, in 2015 and 2018 respectively, as part of a multistate trend to enact bipartisan redistricting reform via constitutional amendment. *Statewide Issue History 2015*, OHIO SECRETARY OF STATE, https://perma.cc/5XR3-AAVM. Article IV § 6, MICHIGAN LEGISLATURE (approved Nov. 6, 2018), https://perma.cc/C5NG-LE5P.

impose a map to protect the right to vote.[116] If other states mimic Ohio and Michigan's reforms, this could become an increasingly common occurrence.[117] Likewise, if, as some scholars are advocating,[118] *Moore v. Harper* strips state courts of their remedial powers in congressional apportionment cases, the frequency of state-judiciary-prompted redistricting stalemate cases reaching federal courts could absolutely explode.[119]

It is well established that every act of the state legislature, repugnant to the state constitution, is absolutely void.[120] And state judicial review acts as a critical state constitutional check on the state legislature's power, much like an executive veto. It would seem to naturally follow that a state reapportionment plan rejected by a state supreme court as unconstitutional could not possibly be perceived as an enacted state plan that is owed deference. But a two-judge majority of the three-judge *Gonidakis v. LaRose*[121] federal district court decided otherwise.[122]

In the wake of the 2020 census data's release, Ohio's mapmaking body, the Ohio Redistricting Commission (the Commission), faced its first task since the 2015 bipartisan redistricting amendment: to draw new electoral maps in time for the 2022 primary election. The Commission must act in accordance with the guidelines set out in the constitutional amendment which require that electoral maps reflect the partisanship of Ohio voters and not unfairly favor one party.[123] Fairly quickly, it became clear that the Commission was unwilling to meet their state constitutional duties.[124] On five separate occasions, the Commission presented maps to the Ohio Supreme Court that the court rejected as unconstitutional as they were flagrantly

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[116] Gonidakis v. LaRose, No. 2:22-CV-0773, 2022 WL 1175617 (S.D. Ohio Apr. 20, 2022).

[117] Ohio could see a redistricting stalemate like this as often as every two years. OHIO CONST. art. XI, § 8, cl. C(1)(b). One judge in the *Gonidakis* case predicts that this state-judicial redistricting stalemate in Ohio will be a recurring issue. *Gonidakis*, 2022 WL 1175617, at *40 (Marbley, C.J. concurring in part and dissenting from the remedy) (noting that "[t]he 2024 Commission, faced with the options of ceding political power or simply waiting out adverse court decisions, likely will be tempted to take the same course [of allowing a federal court to impose their will])."

[118] William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, THE ATLANTIC (Oct. 11, 2022), https://perma.cc/RWL9-M9RT; Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1059–60 (2021).

[119] *Infra* Section V.

[120] *Supra* Section II.

[121] 2022 WL 1175617 (S.D. Ohio Apr. 20, 2022).

[122] *Id.* at *27 (holding that "the fact that [the state electoral map rejected by the Ohio Supreme Court] does not comply with the Ohio Supreme Court's interpretation of [the state constitution] does not prevent this court from imposing it."); Gonidakis v. LaRose, No. 2:22-CV-0773, 2022 WL 1709146 (S.D. Ohio May 27, 2022) ("Gonidakis II") (imposing the remedy selected in the April 20 *Gonidakis* opinion).

[123] OHIO CONST. art. XI, § 6.

[124] League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 2022-Ohio-65, —— N.E.3d ——, ¶ 16, ¶ 20 (Jan. 12, 2022) ("League I").

gerrymandered to disfavor the minority party.[125] Despite being ordered by the Ohio Supreme Court to redraw the maps alongside an independent map drawer, the Commission continued to shirk their duties until Ohio's 2022 primary election was in crisis.[126]

So, in *Gonidakis v. LaRose*, less than two weeks before the primary election was scheduled to occur by state statute,[127] a three-judge federal court intervened to protect the right to vote and impose state electoral maps that met the one-person-one vote criteria. The court suspended the primary election date, but made clear that there was not time for the court to draw its own maps, and opted to select amongst three state electoral maps presented by the parties.[128] Two of those maps, drawn and approved by the Commission, had been struck down by the Ohio Supreme Court.[129] The other map had been drawn by the independent mapmaker that the Ohio Supreme Court had ordered the Commission to hire, but the Commission ultimately rejected that mapmaker's map.[130]

The two-judge majority placed emphasis on the fact that to impose a map not adopted by the Commission was also in violation of the state constitution which explicitly vested sole mapmaking power to the Commission.[131] The court saw "no basis in Ohio or federal-constitutional law for favoring some provisions of the Ohio Constitution over others."[132] Even while acknowledging that "every map [before the court] lack[ed] legal force,"[133] the two-judge majority "emphasiz[ed] the deference due the legislative process in districting,"[134] and, thus, opted to elevate the Commission's policy preferences as expressed in its unconstitutional maps "even when doing so [ ] violate[d] other state laws, including [the] state

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[125] *Id.*; League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 2022-Ohio-342, —— N.E.3d —— (Feb. 7, 2022) ("League II"); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, —— Ohio St. 3d ——, 2022-Ohio-789, —— N.E.3d —— (Mar. 16, 2022) ("League III"); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 2022-Ohio-1235, —— N.E.3d —— (Apr. 14, 2022) ("League IV"); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 2022-Ohio-1727, —— N.E.3d —— (May 25, 2022) ("League V").

[126] *League III*, 2022-Ohio-789, ¶ 30.

[127] *Gonidakis*, No. 2:22-CV-0773, at *1.

[128] *Id.* at *23, *28.

[129] *Id.* at *23.

[130] *Id.* at *6, *23.

[131] *Id.* at *25, *27 ("Here, the Commission's policy preferences are reflected in Map 3 but not in the maps the Intervenors propose. And while the Ohio Constitution places numerous substantive restraints on redistricting, it also assigns mapmaking authority solely to the Commission, which has a degree of political accountability that far outstrips that of the maps affirmatively rejected by the Commission or offered by the parties in this litigation.").

[132] *Id.* at *27.

[133] *Gonidakis*, No. 2:22-CV-0773, at *25, n.19.

[134] *Id.* at *27.

constitution[ ]."[135] The two-judge majority held that "the fact that [the state electoral map rejected by the Ohio Supreme Court] does not comply with the Ohio Supreme Court's interpretation of [the state constitution] does not prevent this court from imposing it."[136]

The third *Gonidakis* judge dissented from the two-judge majority's selected remedy, noting that it was unprecedented for a federal court to "order the adoption of a redistricting plan the state high court has deemed unconstitutional."[137] Explaining that the state constitution "is the paramount law . . .written by the supreme power of the state, the people themselves,"[138] the judge concluded:

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[135] *Id.* at *26. In doing so, the two-judge majority relied on three VRA cases to support this inference. Tallahassee Branch of NAACP v. Leon Cnty., Fla., 827 F.2d 1436, 1438 (11th Cir. 1987) (finding that a reapportionment plan enacted by a county commission was owed deference even though the plan had not been subject to referendum as required by state statutory law); Straw v. Barbour Cnty., 864 F. Supp. 1148, 1152 (M.D. Ala. 1994) (finding that a properly adopted reapportionment plan that did not comply with state statutory notice requirement was still owed deference); Navajo Nation v. Arizona Indep. Redistricting Comm'n, 230 F. Supp. 2d 998, 1008 (D. Ariz. 2002) (finding a plan that did not meet state constitutional notice requirements was owed deference as a properly enacted plan, where all parties stipulated to the plan and conceded they were unable to meet the notice requirements under the emergency situation created by failed VRA preclearance). These three cases explicitly explore the bounds of what is "'legislatively enacted' for purposes of section 2 and section 5" of the VRA. *Tallahassee Branch of NAACP.*, 827 F.2d at 1440. They stand for the proposition that "under the special exigent circumstances presented [in a VRA case] [ ], the court holds that it must give deference to the plan enacted . . . even if state law was violated." *Straw*, 864 F. Supp. at 1155. To divorce the reasoning in these cases from the specific exigent circumstances presented in a VRA case is unwise.

[136] *Gonidakis*, 2022 WL 1175617, at *27. The two-judge majority also couched its deferral to the unconstitutional map as a matter of administrative convenience and minimizing disruption for the Ohio Secretary of State. *Id.* at *23–*25. The two-judge majority reasoned that, since the unconstitutional map had begun to be implemented, selecting it allowed the state to maximize the one-month cure period following this opinion before the selected remedy was officially imposed, during which the state could focus on properly enacting their own maps. *Id.* at *23–*25. The dissenting judge rebuked the necessity and consequences of such a choice. *Id.* at *39 (Marbley, C.J. concurring in part and dissenting from the remedy). The one-month cure period came and went, and, perhaps unsurprisingly, given the federal court's pronounced impending favorable injunction, the Commission made no further efforts to construct a new proper map prior to the May 28 deadline. *See* Ohio Redistricting Commission Meeting, *Meeting Transcript* (May 5, 2022), at 8–12; *League V*, 2022-Ohio-1727, ¶ 4. As such, the federal court imposed the selected map and Ohio proceeded with court-imposed unconstitutional, hyperpartisan maps for the 2022 election. *Gonidakis II*, 2022 WL 1709146.

[137] *Gonidakis*, 2022 WL 1175617, at *34 (Marbley, C.J. concurring in part and dissenting from the remedy).

[138] *Id.* at *35 (quoting State *ex rel.* Weinberger v. Miller, 87 Ohio St. 12, 99 N.E. 1078, 1079 (1912)).